80-1721

Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

April Term, 1981

M. RANDALL PEEK, Petitioner
v.
ERNEST BILLY FITZGERALD
and
MARILYN FITZGERALD, Respondents

On Writ of Certiorari
From the United States Court of Appeals
For the Fifth Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether the final decision rendered by the United States Court of Appeals for the Fifth Circuit directly contravenes the United States Supreme Court's opinions in *Younger v. Harris, Cameron v. Johnson, and Kugler v. Helfant.*

2. Whether the final decision rendered by the United States Court of Appeals for the Fifth Circuit directly conflicts with important and significant principles of federal judicial restraint promulgated by the United States Supreme Court.

3. Whether the decision rendered by the United States Court of Appeals for the Fifth Circuit is void due to *ab initio* lack of jurisdiction.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

The petitioner M. Randall Peek respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court Of Appeals For The Fifth Circuit entered in this proceeding on January 14, 1981.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit, not yet reported, as well as the opinion of the Federal District Court, Northern District of Georgia appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 14, 1981 and this petition for certiorari was filed within ninety (90) days of that date. This court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the final decision rendered by the United States Court of Appeals for the Fifth Circuit directly contravenes the United States Supreme Court's opinions in *Younger v. Harris, Cameron v. Johnson, and Kugler v. Helfant.*
2. Whether the final decision rendered by the United States Court of Appeals for the Fifth Circuit directly conflicts with important and significant principles of federal judicial restraint promulgated by the United States Supreme Court.
3. Whether the decision rendered by the United States Court of Appeals for the Fifth Circuit is void due to *ab initio* lack of jurisdiction.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 48.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (42 USCS § 1982). United States Code, Title 28:

§ 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.
June 25, 1948, c. 646, 62 Stat. 968.
United States Code, Title 18.

§ 1504. Influencing juror by writing

"Whoever attempts to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any written communication, in rela-

tion to such issue or matter, shall be fined not more than one thousand ($1,000.00) Dollars or imprisoned not more than six (6) months or both.

Nothing in this section shall be construed to prohibit the communication of a request to appear before the Grand Jury."

STATEMENT OF THE CASE

(a) COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW.

This is a Petition for Certiorari to review the decision rendered by the United States Court of Appeals for the Fifth Circuit. That opinion affirmed an order issued by the Federal District Court for the Northern District of Georgia which enjoined the pending state criminal prosecution of Respondent for Embracery, Ga. Code 26-2407 and Terroristic Threats, Ga. Code 26-1307 on the grounds that said state criminal prosecution was brought in bad faith. The Respondent first moved for a temporary restraining order based upon allegations of bad faith prosecution and invoked jurisdiction of the federal court under 28 U.S.C. Sections 1331, 1343, 2201, 2202; 42 U.S.C. Sections 1983, 1988; and the First and Fourteenth Amendments to the United State Constitution. The temporary restraining order was granted and a two day hearing was held in the District Court to determine if a preliminary injunction should issue. A final order granting the injunction was issued six months later. Appeal was timely filed with the United States Court of Appeals for the Fifth Circuit and their opinion affirming the judgment rendered by the District Court was issued January 14, 1981.

(b) This involved and complex set of circumstances began on Thursday, September 2, 1976 when Mr. Bonner, then Sheriff of DeKalb County, took out an arrest warrant charging the Respondent in this case with Terroristic Threats, Ga. Code 26-1307. These terroristic threats were made during a phone call from the Respondent to the DeKalb County Police Department on the morning of September 1, 1976. Lieutenant Baker, Aide to Chief Dick Hand, received the call and made a tape recording of the conversation. During the conversation between Lieuten-

ant Baker and Respondent, statements were made by Respondent that he had organized crime connections which he would use to have Sheriff Bonner killed. He also stated that he owned a semi-automatic which he would use to kill Sheriff Bonner.

The evening of September 1, 1976, Respondent was arrested for driving under the influence of alcohol by a DeKalb County Uniform Officer and found to be in possession of a gun. The warrant for Respondent's arrest was handwritten and fairly illegible so a second warrant was typed and signed by Magistrate Charles Smegal. The warrant was served on Respondent on Saturday, September 4, 1976, and bond was set on September 7, 1976 by Superior Court Judge Curtis Tillman after a bond hearing. When Respondent realized that there were two sets of warrants, one handwritten and one typed, he signed warrants against Magistrate Clerk Charles Smegal and Sheriff Bonner for False Swearing and Tampering with Evidence. The charges against Magistrate Clerk Charles Smegal were dismissed by Superior Court Judge Clarence Peeler, Jr., at the conclusion of the hearing on these charges.

Sheriff Bonner left office at the end of 1976 after being defeated in his bid for re-election and was indicted for murder by a DeKalb County Grand Jury shortly after leaving office. In view of the pending charges against Mr. Bonner, the District Attorney (hereinafter referred to as the Petitioner) stayed any proceedings in the cross-charges between the Respondent and Mr. Bonner until the murder charge had been resolved at trial and informed Respondent of that decision. In the Spring of 1977, Mr. Bonner was acquitted of the murder charge at the conclusion of a trial in DeKalb County Superior Court.

The Petitioner then ordered that a preliminary hearing be held in the Magistrate Court of DeKalb County to determine the substance of the evidence existent on the cross charges pending between the Respondent and Mr. Bonner. One hearing was set for the morning of August 24, 1977 and another hearing was set for the afternoon of that same day. During the morning session, Magistrate Judge Tom Moran held a conference in his chambers and discussed the situation with the attoney then retained by the Respondent and the attorney for Mr. Bonner. At the conclusion of the conference, the Magistrate

stated he desired to dismiss all of the pending warrants and called the Assistant District Attorney Michael Sheffield into his chambers to inform Mr. Sheffield of his decision. Mr. Sheffield voiced no objection to the Court's decision, so the charges were dismissed in open Court. The basis for the dismissal was each victim's lack of interest in prosecuting the charges at that time.

The Petitioner (who was not present at the Magistrate Court) felt, in his discretion (See transcript, p. 149), that an evidentiary basis would be a preferable disposition to the cross-charges. Because the only forum available at that point to hear evidence on the charges was the Grand Jury of DeKalb County, the Respondent then scheduled a presentation to the Grand Jury of the evidence on those charges on September 13, 1977. In consideration of the Respondent, the Petitioner personally informed them of this Grand Jury presentation, at which time the Respondents verbally assaulted the Petitioner in his own office.

On or about the 8th or 9th of September, 1977, the Respondents' daughter came to the District Attorney's Office in an attempt to discuss the proceedings with Assistant District Attorney Robert Wilson who was handling the case. She was informed by the Assistant that the charges would be presented fairly and accurately to the Grand Jury, but that he wished to have no contact whatsoever with the Respondents. She was also told that it would be inappropriate for the Respondent to contact any Grand Jury members who would be hearing the evidence on the Respondents' case in the same way the Respondents had contacted the July-August Term Grand Jury, 1977. (See transcript, p. 174).

In spite of this instruction, a packet of information was mailed to the home of each member of the September-October Grand Jury. This packet contained a transcript showing the dismissal of the Terroristic Threats charge at the Magistrate Court, the very charges which were to be considered by these grand jurors, a letter from the Respondents containing allegations about the circumstances of the Respondent's arrest on those charges, a discussion about the delay between the inception of those charges and their presentation to this grand jury, two

newspaper articles charging Superior Court Judge E. T. Hendon, Jr., and Superior Court Judge Clyde Henley with misconduct in their official duties, and a copy of a lawsuit which Appellees had filed against Superior Court Judge Clyde Henley. It is important to note that Clyde Henley was the presiding Superior Court Judge over that September-October Grand Jury and, thus, had the responsibility for charging them and maintaining the integrity of the grand jury process. (See transcript, p. 195-197.) This material was intended to be received by the grand jury members before the case against the Respondents was heard by them. On September 13, 1977, the Terroristic Threats case was no billed by the Grand Jury.

The Petitioner was seriously concerned about the presentation of the case to the Grand Jury on September 13, 1977 for several reasons. First, one of the attorneys who had been present at the Magistrate Court hearing had expressed some dissatisfaction about the way the case had been handled at the Magistrate Court hearing. Secondly, the inappropriate contact with the Grand Jury had influenced its consideration of the terroristic threats charges in possible violation of a criminal statute, Ga. Code § 26-2407, which prohibits this type of contact. Thirdly, that type of contact was quite likely to impair the integrity of the Grand Jury system. Because of these concerns, the Petitioner in his discretion, decided to present all evidence to the now empanelled November-December Grand Jury. All evidence was presented to that Grand Jury and that body returned a true bill of indictment against the Respondents for Embracery and Terroristic Threats.

When the Respondents had been informed by Petitioner on September 2, 1977 that the terroristic threats charge would be presented to the September-October Term Grand Jury, they filed a lawsuit against Superior Court Judge Clyde Henley falsely charging him with imposing his will upon the District Attorney A copy of this lawsuit was contained in the packet mailed to the grand jury over which Judge Henley was presiding. (See Record p. 21.) During the term of that September-October Grand Jury, the Respondents were ordered to appear for depositions in this civil suit against Judge Henley. Before the date for their appearance, the Respondents sought a pro-

tective order from Superior Court Judge William Dean which was denied.

The Respondents, without any reason given, failed to appear for their scheduled depositions and were ordered to appear and show cause in Court as to the reason for their failure to appear. This show cause order is placed with all other orders and motions to be heard by the Superior Court Judge presiding over civil non-jury duty. There is no way to determine beforehand when the motion will be heard and by what Judge. (See transcript, p. 37, 56, 59.)

The motion appeared on the calendar on October 31, 1977 before Superior Court Judge E. T. Hendon, Jr. At that time, the Respondents moved for Judge Hendon to recuse all the Judges in DeKalb County, which motion Judge Hendon denied. The Respondents never moved for Judge Hendon to recuse himself, which motion Judge Hendon indicated he would have granted. (See transcript, p. 56, 57.) The Respondents dismissed the suit with prejudice, the very day the September-October Grand Jury over which Judge Henley presided was to be discharged.

On December 15, 1977, the Respondents were arraigned on the Embracery charge and trial was set for January 3, 1978. During the month of December, Mr. Samford, the Attorney for the Respondents, and Mr. Wilson, the Assistant District Attorney who would try the case, were in constant contact concerning the case. As the Assistant District Attorney knew he would be leaving town on Thursday, December 29, 1977, he asked the Respondents' attorney repeatedly what type of pre-trial action the Respondents' attorney intended to take as to motions, etc., because the State's attorney wished to be in a position to answer these motions before trial. The State's attorney made it very clear that he was to leave town on Thursday, December 29, 1977 and would not return until the evening of January 2, 1978. On Friday, December 30, 1977 at 4:30 p.m., the day after the State's attorney left town, the Respondents' attorney filed his motion in Federal District Court for the Northern District of Georgia for a temporary Restraining Order to enjoin the State's prosecution of the Respondent for Embracery. The Respondents' attorney and the District Court Judge who was to hear the motion conferred for several

hours on Saturday, December 31, finally reaching the State's attorney that afternoon in Alabama. A hearing to determine whether or not a Preliminary Injunction should issue against the State's criminal prosecution was scheduled at that time for 1:30 p.m., Tuesday, January 4, 1978 (that Monday being a holiday). At 9:00 a.m., Tuesday, January 4, 1978, Respondent served Superior Court Judge Clyde Henley and Superior Court Judge E. T. Hendon, Jr., with subpoenas to appear and testify at the Preliminary Injunction Hearing to begin at 1:30 p.m. that very day. Judge Henley was in the middle of a criminal trial and Judge E. T. Hendon, Jr., was also scheduled to be on the bench that day.

At the time the application for the Temporary Restraining Order was filed, both the Respondents' attorney and the District Court Judge knew that the DeKalb Judges having previous contact with the Respondent had recused themselves and a judge from outside DeKalb County was coming in specially to try the Embracery case. (See Respondents' complaint, p. 5.) Secondly, the State Court was never allowed to hear the Motion to Quash the Indictment filed by the Respondents' attorney. Said motion and any additional motions were to be heard before trial as is the usual procedure under the law. However, a Temporary Restraining Order was granted on January 2, 1978 and a hearing on a Preliminary Injunction was held before the State Court ever had an opportunity to hear or decide those motions.

A two-day hearing was held to determine if a Preliminary Injunction should issue, but no order was issued until June 22, 1978 permanently enjoining the prosecution of the Respondents.

REASONS FOR GRANTING THE WRIT

1. The final decision rendered by the United States Court of Appeals for the Fifth Circuit directly contravenes the United States Supreme Court's opinion in *Younger v. Harris, Cameron v. Johnson* and *Kugler v. Helfant.*

The United States Court of Appeals for the Fifth Circuit held in *Fitzgerald v. Peek, Opinion No. 78-2705,* that when a

plaintiff seeks under 48 U.S.C. 1983, to enjoin a pending State criminal prosecution allegedly brought against him in bad faith he does not have to show that the said pending State prosecution could not result in a valid conviction.

This ruling directly contravenes the opinions rendered by the United States Supreme Court from 1965 in *Dombrowski v. Pfister, 380 U.S. 479* up until the last major decision in the *Younger v. Harris* line of cases with Justice Stewart's specific definition of bad faith prosecution in *Kugler v. Helfant, 421 U.S. 117 (1975).*

Although the court indicated in *Mitchum v. Foster, 407 U.S. 225 (1972)* that actions brought under 48 U.S.C. 1983 would fall under the first of the only three exceptions to Abstention Statute 28 U.S.C. 2283 "expressly authorized by Congress," it is well settled that the Plaintiff seeking an injunction in a *Younger v. Harris, 401 U.S. 37 (1971)* situation must still show that he is likely to succeed on the merits. Rice, Charles, "Limiting the Younger Doctrine," 67 Calif L. Rev. 1318, at 1325, 1326. Mr. Wright and Mr. Miller indicate that one of the four factors essential to the court's contemplation of a preliminary injunction is the probability that the Plaintiff will succeed on the merits. 11C Wright and Miller, Federal Practice and Procedure § 2948 at 431-32 (1973).

In circumstances very similar to the case at bar in that they involved alleged judicial collusion, the United States Supreme Court in *Kugler v. Helfant,* supra, opined that vital to determining whether the pending State criminal prosecution should be enjoined on bad faith grounds was the finding that the prosecution had been brought without hope of obtaining a valid conviction. "Bad faith in this context generally means that a prosecution has been brought without reasonable expectation of obtaining a valid conviction" *Kugler,* supra, footnote 6 at 1531. This ruling in *Kugler* is not an unexpected one, but a reiteration of the Supreme Court's long established position in this area. In 1965, the majority opinion in *Dombrowski v. Pfister,* supra, stated that appellants in seeking an injunction against a pending State criminal prosecution had stated a valid claim under 42 U.S.C. 1983 when they alleged that the prosecution was brought against them in bad faith because the ap-

pellees "have invoked and threaten to invoke the criminal process *without any hope of success,* but only to discourage the appellants' civil rights activities" emphasis added.

Three years later, both the majority and dissenting opinions in *Cameron v. Johnson* 390 U.S. 611 (1968) made clear that the court must find that a valid conviction could not be obtained in the pending State criminal prosecution before it would enjoin said prosecution. "Appellant's case that there are special circumstances establishing irreparable injury sufficient to justify federal intervention must therefore come down to the proposition that the statute was enforced against them, not because the Mississippi officials in good faith regarded the picketing as violating the statute, but in bad faith as harassing appellants' exercise of protected expression with no intention of pressing the charges or with no expectation of obtaining convictions, knowing that appellants' conduct did not violate the statute," at p. 619. Even more explicit is this language found again at p. 621 where the majority states that the "Question for the District Court was not the guilt or innocence of the persons charged; the question was whether the statute was enforced with no expectation of convictions but only to discourage protected rights. The mere possibility of erroneous application of the statute does not amount to irreparable injury[1] necessary to justify a disruption of orderly State proceedings. *Dombrowski cited.* The issue of guilt or innocence is for the State court at the criminal trial; the State was not required to prove the Appellants guilty in the federal proceeding to escape the finding that the State had no expectation of securing valid convictions."

The realization that the dissent fully agrees with the majority's above logic and language makes even more overwhelming the Supreme Court's mandate that a federal court examine this factor. Consider the dissenting opinion language at p. 623, "Federal courts are available to enjoin the invocation of the State criminal process where that process is abusively

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[1] The Fifth Circuit has said bad faith and irreparable injury are the same, therefore such erroneous statutory application could never amount to bad faith in the Fifth Circuit and for this reason this case at Bar should be reversed. See *Shaw v. Garrison,* 467 F2d 113) (5th Cir. 1972).

invoked 'without any hope of ultimate success, but only to discourage' the assertion of Constitutionally protected rights. 380 U.S. at 490. See also *City of Greenwood v. Peacock, 384 U.S. 808-829 (1966)*", and again by finding at p. 626 that "the pickets were arrested and prosecuted without any hope of ultimate success" and at p. 627 "the State cannot possibly anticipate a conviction of the pickets."

According to the opinion in *Perez v. Ledesma, 401 U.S. 81 (1971)* decisions were rendered by the United States Supreme Court on the same day in *Younger v. Harris*, supra, *Samuals v. Mackell, 401 U.S. 66 (1971)* and *Boyle v. Landry, 401 U.S. 77 (1971)* explaining that "only in cases of proven harassment or prosecutions undertaken by State officials in bad faith without hope of obtaining a valid conviction . . . is federal injunctive relief against pending State prosecutions appropriate. See *Younger v. Harris*, supra; *Ex Parte Young, 209 U.S. 123 (1908).*" *Perez*, supra, at 85. The requirement that federal courts must look to see if the State prosecution was brought without hope of obtaining a valid conviction before it will issue an injunction is so strongly mandated that even Respondent feels compelled to allege such in his original complaint. In seeking to enjoin the pending State criminal prosecution, he alleges that the State has violated his Constitutional rights "by, in bad faith and for purposes of harassment, pressing charges against them that he (State) knows cannot form the basis for a proper conviction." See Appendix.

The Federal District Court found in its order granting a preliminary injunction that it was "unnecessary for the court to address the question whether there is any reasonable expectation of conviction of terroristic threats under Georgia law" and further that "it is also unnecessary to address the very real question of whether Mr. Fitzgerald could be convicted on the embracery charge" and "it is finally unnecessary to address the issue of whether the actions of Mrs. Fitzgerald constituted the crime of embracery . . ." Order at p. 10 and 11 (appendix).

These findings were incorporated without any meaningful dissection by the Fifth Circuit into its opinion by stating that "if the Plaintiff established that the conduct allegedly retaliated against or sought to be deterred is Constitutionally protected

and the State's bringing of the prosecution is motivated at least in part to retaliate against that conduct... A bad faith showing of this type will justify an injunction regardless of whether valid convictions could conceivably be obtained." See Appendix.

Both the opinion rendered by the District Court and the opinion rendered by the United States Court of Appeals for the Fifth Circuit create an unreasonable and needless expansion by the federal court into the State judicial process. Furthermore, both opinions ignore the specific language issued by the United States Supreme Court in *Dombrowski v. Pfister*, supra, *Younger v. Harris*, supra, *Cameron v. Johnson*, supra, and *Kugler v. Helfant*, supra, which require in no uncertain terms that a federal court must determine whether the State has brought the prosecution sought to be enjoined without hope of obtaining a valid conviction before that prosecution may be enjoined by a federal court on the grounds that the said prosecution was brought in bad faith. For that reason Petitioner respectfully requests the United States Supreme Court to grant this Petition for Writ of Certiorari.

2. The decision rendered by the United States Court of Appeals for the Fifth Circuit directly contravenes the important principles of federal judicial restraint promulgated by the United States Supreme Court.

The issuance of a federal injunction even when permitted by the *Younger* doctrine is limited by additional requirements, one of the most significant being the principle of federalism. *Younger v. Harris, 401 U.S. 37 (1971).* The Fifth Circuit's opinion in this case has violated this important principle of federalism or comity, that is, the proper reluctance on the part of the Federal Court to interfere with the orderly functioning of the State judicial process. The United States Supreme Court has indicated the great deference due State criminal proceedings in *Rizzo v. Goode, 423 U.S. 362 (1976)* by explaining that where an injunction against a criminal proceeding is sought under Section 1983, the principles of equity, comity and federalism must nonetheless restrain a Federal Court," at 379.

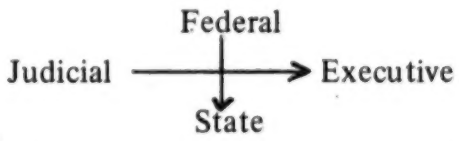
To enjoin the criminal proceeding in this case would be to unduly interfere with the orderly State judicial processing of this criminal prosecution. The Respondent initially filed a

motion in the State court to dismiss the criminal indictment which the state court never had the opportunity to hear or to decide before the prosecution was enjoined by the Federal District Court. The trial was to be heard by a judge brought from outside the Circuit to afford the Respondent a fair trial. The Respondent was granted longer time in which to file pretrial motions than usually granted in State criminal proceedings. There is every indication that the State was overextending itself to protect the rights of the Respondent, thus negating any justification to needlessly violate the long standing policy of the Federal Courts to avoid interfering with the orderly functioning of the State judicial process. These factors also indicate that Respondent would have numerous adequate remedies at law and thus would not suffer irreparable injury if the Federal Court had properly abstained.

This doctrine of federalism also extends to the discretionary functions of a State executive officer. *Rizzo v. Goode,* supra. In *Younger v. Harris,* supra, the Court expressed concern that the issuance of federal injunctive relief would impede the performance of those functions by stating that "ordinarily there should be no interference with State officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the State and must decide when and how this is to be done," at 45. Issuance of an injunction in this case improperly and needlessly interfered with the performance of the prosecutor's discretionary duties. It was an exercise of discretion for the Petitioner to present evidence of the crimes to the grand jury feeling that the best disposition of the charges would be a disposition pursuant to a full evidentiary hearing which was not accomplished at the preliminary hearing stage. The Petitioner was adhering to his duty as an officer of the Court and chief law enforcement official of the Stone Mountain Judicial Circuit by seeking indictments for the Respondents' attempt to unlawfully influence the grand jury. This realization is made even more significant by the Respondents' admissions to the elements of the crime and testimony by members of the grand jury who were illegally contacted by Respondent. The Prosecutor's role is that of an advocate with a duty to represent the public to the best of his ability. The unjustified federal intervention into the fulfillment of that role was a great disservice

to those state citizens whom he has sworn to represent.

Not only does the intervention of the Federal Court into the orderly functioning of a State system violate the federal policy of abstention, but also violates the doctrine of separation of powers. The Federal Court, by issuing the injunction, has needlessly imposed the judicial branch into the area of executive discretionary duties. Thus, the Federal Court's intervention into the area of executive discretionary duties has constituted a horizontal and vertical interference with the orderly State process.



The United States Supreme Court anxiously anticipated such a problem to be avoided in *Stefanelli v. Minard, 342 U.S. 117 (1951)* and *Doran v. Salem Inn, 422 U.S. 922 (1975)* when it stated in *Rizzo v. Goode,* supra, at 379 that "when the frame of reference moves from a unitary court system . . . to a system of federal courts representing the nation, subsisting side by side with fifty state judicial, legislative, and executive branches, appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief."

The continuing expansion of federal injunctive relief effected by the injunction in this case will produce an unprecedented burden on the Federal Courts at a time when the United States Supreme Court is granting more and more autonomy to state judicial, and executive functions. See *Rizzo v. Goode,* supra, *Trainor v. Hermandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).* The Honorable Chief Justice Burger has stated that we "need to restore the State courts as the basic system of justice" and "has urged the State courts to take the lead in halting the expansion of the jurisdiction of the Federal Court System." Speech at Conference on the Future of State Courts, National Center of State Courts, quoted from the *New York Times,* Monday, March 20, 1978, p. B12.

A halt to federal expansion will never be effectuated if unwarranted federal judicial activism as that promoted by the Fifth Circuit in this case is allowed to stand. Instead, federal injunctions against pending State criminal proceedings will become the motion to suppress of the 1980's. The Federal Courts will come to a virtual halt while attempting to hear preliminary injunction motions. The impending confusion is well-stated by the Court in *Stefanelli v. Minard, 342 U.S. 117 (1951)* at 123-124, "If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question or procedural due process of law, with its far-flung and undefined range would invite a flanking movement against the system of State Courts by resort to federal forum with review, if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of a trial court all would provide ready opportunities which conscientious counsel might be bound to employ to subvert the orderly, effective prosecution of local crime in local courts."

This scenario is the result of the United States Court of Appeals for the Fifth Circuit upholding an unjustified enjoining of this pending State criminal prosecution because it has forgotten the wise mandate of the United States Supreme Court that the "normal thing to do when Federal Courts are asked to enjoin pending proceedings in State courts is not to issue such injunctions." *Younger v. Harris* at 48.

For this reason we respectfully request that the United States Supreme Court grant this petition for certiorari.

3. The United States Court of Appeals for the Fifth Circuit lacked jurisdiction to affirm the permanent injunction against the pending State criminal prosecution in this case.

28 U.S.C. 2283 requires that a United States Federal Court abstain from enjoining a pending State proceeding unless the circumstances are such that they fall under one of the express exceptions listed in that abstention statute. In this case the Plaintiff has filed a claim under 42 U.S.C. 1983 which was held in *Mitchum v. Foster, 407 U.S. 225 (1972)* to fall within the exception "duly authorized by an Act of Congress."

However, before that injunction may be issued the Federal Court issuing such injunction must have jurisdiction over the action. In this case the Plaintiff has failed to state a cause of action under 42 U.S.C. 1983. This failure to state a claim under which relief could be granted deprived the United States District Court for the Northern District of Georgia of any initial jurisdiction to enjoin the pending State criminal prosecution. Said failure of jurisdiction *ab initio* renders void any decision issued by the United States Court of Appeals for the Fifth Circuit.

The Plaintiff alleged that under 42 U.S.C. 1983 that the State prosecution was brought against him in retaliation for the exercise of his Constitutionally protected First Amendment rights. The Fifth Circuit then held that "if the Plaintiff establishes that the conduct allegedly retaliated against or sought to be deterred is Constitutionally protected and that the State's bringing of the criminal prosecution is motivated at least in part by a purpose to retaliate against or deter that conduct..." See Appendix.

The Fifth Circuit fails to enlighten the reader as to what Constitutionally protected rights are involved, but the Respondents' allegations and the District Court's opinion provides only two possible alternatives, i.e., either the Respondents contacting the State grand jury that was considering the possible indictment of Respondents or the Respondents' publication of leaflets accusing State Court Judges of illegal and immoral acts.

The first alternative, Respondents contacting the State grand jury which was considering an indictment against Respondents is not protected by the First Amendment. A specific State Statute Georgia Code 26-2407 prohibits an individual who has been charged as a defendant in an indictment pending before the State grand jury from contacting that State grand jury. *Wood v. Georgia, 370 U.S. 375 (1962)* indicates that said Georgia Statute prohibits direct communication by an individual with a grand jury at a time when a specific indictment against that individual is pending before that body. *Wood v. Georgia,* supra, clearly distinguishes between the above situation and a communication of information pertinent to a general investigation being conducted by a grand jury that is not

concerned with the indictment of the individual that communicated that information. Under the facts of this case, the Respondent's activities clearly fall within the conduct prohibited by the Georgia Statute since the grand jury's attention was focused specifically on the pending indictment of Respondent at the time that each member of said grand jury received a packet of information from the Respondent in an attempt to influence the grand jury's possible indictment of Respondent. If the Fifth Circuit regarded this as the protected Constitutional activity against which the State was retaliating, it is clearly in error. Such activity is clearly prohibited under a valid state statute, almost identical to the federal statute also prohibiting such contact with the federal grand jury. See 18 U.S.C. 1504[2].

In the alternative, if the Fifth Circuit was referring to the Respondent's publication of leaflets accusing state judges of illegal and immoral acts there is no basis anywhere in the record below for their finding that such activity was Constitutionally protected. The First Amendment is not all encompassing. Excluded from its protection are communications that are slanderous or obscene. To find that Respondent's leaflets were protected under the First Amendment at least some of said leaflets had to be introduced into evidence and viewed by the District Court in order to determine that they were not on their face obscene or slanderous. Not only does the District Court fail to make any such finding, the court states that the truth or falsity of such publications are not material to the hearing to enjoin the pending state prosecution. (See R p. 241, p. 407-408.) These leaflets were never made part of the record and there is

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2. If the District Court found that such conduct is Constitutionally protected and the Fifth Circuit has affirmed the District Court's opinion on that basis, then both courts have violated the Pullman Abstention doctrine. Such opinion would in effect declare the state statute Ga. Code 26-2407 unconstitutional before the state courts have had the opportunity to interpret said state statute. There is not one opinion rendered by the Georgia courts interpreting this statute which is the basis for the pending criminal prosecution of Respondent.

no indication that the court ever viewed any of these leaflets in question. Those exhibits that were introduced into the record at the hearing were the packets mailed to the grand jury in violation of Georgia Code 26-2407. Therefore their truth or falsity would be immaterial. The lower court appears confused and has failed to see that although the truth or falsity of the packets mailed to the grand jury was immaterial, the truth or falsity of the leaflets concerning various state court judges published not to the grand jury, but county wide, was very material to finding whether those said leaflets were protected by the First Amendment. Furthermore, the record is replete with testimony that the leaflets were not only false and obscene, but were the subject of a criminal defamation warrant. See R p. 34, 44-45, 184, 203, 205, 207, 209, 224-225, 244, 278, 282-286, 289, 294.

The mailing of the packets to the grand jury was not protected by the First Amendment as it is conduct prohibited by a valid state statute whose language is appropriately very limited to certain specific circumstances. It is similar in every respect to 18 U.S.C. 1504.

The record of the hearing in the District Court below is absolutely empty of any basis to find that the publication of the leaflets concerning the state court judges was protected by the First Amendment.

Because neither alternative above has any foundation for a grant of First Amendment protection, the Respondent's activities are not Constitutionally protected – a key element to stating a cause of action under 42 U.S.C. 1983. Respondent's failure to state or demonstrate a basis for which relief could be granted and also the District Court's failure as shown in the record below, to demonstrate any basis for which a finding for relief could be found deprived the District Court of any jurisdiction to enjoin the pending state criminal prosecution. This lack of jurisdiction *ab initio* makes any decision rendered by the Fifth Circuit affirming said injunction void.

For this reason, Petitioner respectfully prays that the United States Supreme Court grant his Petition for Writ of Certiorari.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Terry T. Coles
Room 304 Executive Building
125 Trinity Place
Decatur, Georgia 30030

APPENDIX

1. Decision of the United States Court of Appeals, Fifth Circuit, No. 78-2705 21

2. Decision of the United States District Court, Northern District of Georgia, No. CA-77-2074 26

3. Complaint by Respondents, No. C-77-2074A 36

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

FILED IN CLERK'S OFFICE
U.S.D.C. – Atlanta
February 9, 1981
Ben H. Carter, Clerk
By:
Deputy Clerk

No. 78-2705

D. C. Docket No. CA 77-2074

ERNEST BILLY FITZGERALD
and
MARILYN FITZGERALD,
Plaintiffs-Appellees,

versus

M. RANDALL PEEK, District Attorney
Stone Mountain Judicial Circuit,
individually and in his official capacity,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

Before INGRAHAM, RONEY and THOMAS A. CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel,

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellees the costs on appeal to be taxed by the Clerk of this Court.

January 14, 1981

Issued as Mandate: February 5, 1981

A true copy
Test: GILBERT F. GANUCHEAU
Clerk, U. S. Court of Appeals, Fifth Circuit

By _____
Deputy
New Orleans, Louisiana
February 5, 1981

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-2705

ERNEST BILLY FITZGERALD
and MARILYN FITZGERALD,
Plaintiffs-Appellees,

versus

M. RANDALL PEEK, District Attorney
Stone Mountain Judicial Circuit
individually and in his official capacity,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Georgia

JANUARY 14, 1981

Before INGRAHAM, RONEY and THOMAS A. CLARK,
Circuit Judges.

PER CURIAM:

Plaintiffs, Ernest Billy and Marilyn Fitzgerald, brought suit in federal district court to enjoin state court prosecution allegedly brought in bad faith for purposes of harassing and punishing plaintiffs for having exercised their First Amendment rights in criticizing certain public officials in DeKalb County. The district court entered a temporary restraining order and, following a two-day hearing, entered a final order permanently enjoining prosecution of the Fitzgeralds on pending indictments charging embracery and terroristic threats. We affirm.

Jurisdiction over this suit is properly predicated on 42 U.S.C.A. § 1983 and 28 U.S.C.A. § 1343(3). See *Duncan v. Perez*, 445 F.2d 557, 560 (5th Cir.), *cert. denied*, 404 U.S. 940 (1971). Section 1983 is within the "expressly authorized" exception of the federal anti-injunction statute, 28 U.S.C.A. § 2283. *Mitchum v. Foster*, 407 U.S. 225 (1972).

The facts of this case are presented in detail in the district court's opinion and need not be repeated here. It is sufficient to note that a thorough examination of the record requires the conclusion that the district court's finding that the prosecution was brought in bad faith for purposes of harassment was not clearly erroneous.

It is well established that a showing of bad faith prosecution presents a narrow exception to the doctrine of abstention which will justify federal interference in a pending state court criminal proceeding. See *Moore v. Sims*, 442 U.S. 415, 424 (1979); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975); *Younger v. Harris*, 401 U.S. 37, 49 (1971); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Wilson v. Thompson*, 593 F.2d 1375, 1381 (5th Cir. 1979); *Shaw v. Garrison*, 467 F.2d 113, 119-22 (5th Cir.), *cert. denied*, 409 U.S. 1024 (1972); *Duncan v. Perez*, 445 F.2d at 560. A showing of bad faith or harassment is equivalent to a showing of irreparable injury under *Younger*, and irreparable injury independent of the bad faith prosecution need not be established. *Wilson v. Thompson*, 593 F.2d at 1381-82; *Shaw v. Garrison*, 467 F.2d at 120. Moreover, although multiple prosecutions of at least Mr. Fitzgerald were pending, the threat of multiple or repeated prosecutions is not necessary to establish bad faith prosecution. *Wilson v. Thompson*, 593 F.2d at 1381.

Nor is it necessary for plaintiff to prove that the prosecution could not possibly result in a valid conviction. In *Wilson v. Thompson*, decided after the injunction involved herein was entered, this Court enunciated a test which permits a state criminal proceeding to be enjoined if the plaintiff establishes that the conduct allegedly retaliated against or sought to be deterred is constitutionally protected and that the state's bringing of the criminal prosecution is motivated at least in part by a purpose to retaliate against or deter that conduct, and the state fails to show that it would have decided to prosecute

even had the impermissible purpose not been considered. 593 F.2d at 1387. In this case, the evidence supports the finding that the prosecution was brought for the purposes of harrassment and retaliation and would not have been brought but for the improper influence exerted on the prosecutor by certain DeKalb judges to seek the indictments. A bad faith showing of this type will justify an injunction regardless of whether valid convictions conceivably could be obtained.

The handling of this case by the district court did not deprive defendant of any due process rights. The temporary restraining order issued by the district judge notified defendant of the preliminary hearing in accordance with Fed.R.Civ.P. 6 (d). Defendant did not object to the timing of the hearing and in fact rejected the court's offer of more time to prepare his case. Defendant was not unfairly prejudiced by the fact that he was represented at the hearing by an attorney who also testified as a witness, since defendant knew at the time he selected his attorney that the attorney, who also was the assistant district attorney handling the state court prosecution of the Fitzgeralds, was likely to be called as a witness.

The district court's injunction of the prosecution of the Fitzgeralds came only after a thoughtful and well-reasoned opinion finding facts supported by the record and correctly analyzing the law.

AFFIRMED.

A true copy
Test: GILBERT F. GANUCHEAU
Clerk, U. S. Court of Appeals, Fifth Circuit
By _____
Deputy
New Orleans, Louisiana
February 5, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CLERK'S OFFICE
June 22, 1978
Ben H. Carter, Clerk
By
Deputy Clerk

ERNEST BILLY FITZGERALD and MARILYN FITZGERALD	:	
vs.	:	
M. RANDALL PEEK, District Attorney of the Stone Mountain Judicial Circuit, individually and in his official capacity	:	CIVIL NO. C77-2074A

ORDER

Ernest Billy Fitzgerald, one of the plaintiffs in this case, has been variously described as a paranoiac, an alcoholic, a moral degenerate, a congenital liar, a kook, a nut, and a screwball. Even these are entitled to the equal protection of the law. The accuracy of the epithets applied to Mr. Fitzgerald was not proven at the ten hour hearing on his motion that criminal proceedings against him be temporarily restrained. What did become clear, however, was that Mr. Fitzgerald has quixotically taken on some of the most powerful men in DeKalb County, including four superior court judges, a DeKalb County district attorney, two assistant district attorneys, and the longtime former sheriff of the county.

Plaintiffs have been involved for some 20 years in a personal feud with DeKalb County Superior Court Judge E. T. Hendon which began with Judge Hendon's representation of Mrs. Fitzgerald's brother when the judge was a practicing law-

yer. Through the years the Fitzgeralds' animosity towards Judge Hendon spread to his former law partner, Superior Court Judge Clyde Henley. Former DeKalb County Sheriff Ray Bonner is also a particular enemy of the Fitzgeralds. As a result of the enmity which they felt towards these three men, the Fitzgeralds became heavily involved in working for their defeat in the election of 1976. Plaintiffs distributed leaflets and flyers accusing the two judges of immoral and illegal acts. Their campaign against Sheriff Bonner was so vigorous that he blamed the Fitzgeralds for his subsequent defeat.

During the campaign, on September 1, 1976, an officer at the DeKalb County Police Department received and taped statements about Sheriff Bonner made by a person identifying himself as Ernest Billy Fitzgerald. Interpreting the statements as a threat on his life, Mr. Bonner swore out a warrant against Mr. Fitzgerald for making terroristic threats against him and for criminal libel on September 2, 1976. During the evening of September 1 and until 2:00 p.m. September 2, 1976, Mr. Fitzgerald was in police custody on a charge of driving under the influence of alcohol. Sheriff Bonner signed and caused to be substituted a new set of warrants dated September 3, and it was not until Saturday, September 4, that Mr. Fitzgerald was arrested. The effect of this was to prevent Mr. Fitzgerald's making bond until after the long Labor Day weekend. On September 7, 1976, a bond of $10,000 was set by Judge Curtis V. Tillman. Mr. Fitzgerald subsequently filed charges against Sheriff Bonner for false swearing and tampering with the evidence. The sheriff was, however, never arrested.

During the period the Fitzgeralds were attempting to have the charges against Mr. Fitzgerald brought to some resolution, murder charges were pending against former Sheriff Bonner in DeKalb County. During conversations with the DeKalb County District Attorney, the Fitzgeralds received the impression that the resolution of the charges against them depended upon the outcome of Mr. Bonner's trial. A preliminary conference was finally held in the Magistrate's Court before Judge Tom Moran in regard to the charges against Mr. Fitzgerald on August 24, 1977. The magistrate also took up at this time Mr. Fitzgerald's charges against Mr. Bonner. Following a conference between

Mr. Bonner's attorney, Mr. Fitzgerald's attorney, and Assistant District Attorney Mike Sheffield, all charges against all parties were dismissed. Mr. Sheffield indicated that not only did he believe that all parties were satisfied with the dismissal but that what Mr. Fitzgerald was charged with doing was not a crime because the threats were communicated to a third person.

After the dismissals in August, 1977, both Judge Henley and Judge Hendon discussed the dismissals with District Attorney Peek and indicated that the matter should be presented to the grand jury even though the charges had been dismissed following the preliminary hearing. The case was presented to the September-October Grand Jury, which returned a "no-bill" on September 13. The case was re-presented to the November-December Grand Jury on December 5, 1977, and a true bill was returned.

At the hearing in this court on January 4, 1978, Mr. Peek offered three possible explanations for his decision to seek indictments against Mr. Fitzgerald after the preliminary hearing: (1) that Judge Hendon and Judge Henley asked him to; (2) that he believed that Mr. Bonner's attorney was dissatisfied with the result of the preliminary hearing; (3) that after the hearing Mr. Fitzgerald had issued more leaflets which were critical of Judge Hendon, Judge Henley, and Mr. Bonner.

The embracery charge against both Mr. and Mrs. Fitzgerald grew out of two contacts which Mrs. Fitzgerald had with the DeKalb County Grand Jury. Mrs. Fitzgerald initially contacted the July-August Grand Jury to ask that certain matters be investigated. These matters included the handling of the Ray Bonner murder trial, the reduction of a murder charge against Judge Henley's former son-in-law, which had been reduced to involuntary manslaughter by Judge Robert Broome, Judge Hendon's handling as a lawyer of a number of criminal cases before Judge Henley, his former law partner, and Judge Henley's record of prior criminal convictions. Two members of the July-August Grand Jury went to the Fitzgerald's house to investigate the basis for Mrs. Fitzgerald's allegations. They came away convinced that there was some evidence to back up at least some of the allegations. Several members of the grand jury were interested in calling a special grand jury to further

investigate the Fitzgeralds' charges but were discouraged from doing so after learning that a majority of the superior court judges would have to concur. At the hearing on January 4 and 5, 1978, Mrs. Gloria Neiswinder, a member of the July-August Grand Jury, testified that she was one of the two grand jurors who had gone to the Fitzgeralds' home. She said that Assistant District Attorney Wilson had told her to ignore the letters because the Fitzgeralds were "kooks." At the end of September she was called in by Mr. Wilson and questioned in regard to the Fitzgeralds.

The second contact with the grand jury was made by Mrs. Fitzgerald on September 9 and 10, 1977, after she learned that the terroristic threats charge would be presented to the September-October Grand Jury. A packet containing a letter, several newspaper clippings, a transcript of the August 24 preliminary hearing on the terroristic threats charge, and a copy of the complaint in a case filed September 6 by Mr. and Mrs. Fitzgerald charging Judge Henley, who was presiding over the September-October Grand Jury, with improperly influencing District Attorney Peek with respect to instituting charges against the Fitzgeralds was mailed to at least 20 grand jurors. The Fitzgeralds' daughter, Dawn Moore, helped her mother prepare the package and draft the letter. Both women and Mr. Fitzgerald insist that he knew nothing of this contact with the September-October Grand Jury. There appears to have been a genuine misunderstanding on the part of Dawn Moore and Assistant District Attorney Wilson as to what was said in a conversation which she had with him on September 8, prior to the contact with the September-October Grand Jury. Mr. Wilson was asked by Mrs. Moore whether it would be appropriate for her mother to contact the grand jury. She remembers his, in essence, authorizing the contact and told her mother that Mr. Wilson said it "wouldn't hurt" to make the contact. Mr. Wilson does not recall giving permission for the contact and testified that he told Mrs. Moore that it would be inappropriate. Mrs. Fitzgerald also spoke with Mrs. Neiswinder about the propriety of contacting the September-October Grand Jury. Mrs. Neiswinder testified at the January 4-5 hearing that she told Mrs. Fitzgerald that she felt the contact would be proper for Mrs. Fitzgerald to express her views to the grand jury on the proposed terroris-

tic threats indictments since the district attorney would be presenting his case to the grand jury.

As discussed above, the September-October Grand Jury returned a "no-bill" in regard to the terroristic threats charge presented to them after the charges had been dismissed at the August 24 preliminary hearing. After the "no-bill" was returned, a decision was made to seek an indictment against both Mr. and Mrs. Fitzgerald on 20 counts of embracery. How this decision was made is unclear, but again there were conversations between members of the district attorney's office and Judge Henley and Judge Hendon. The November-December Grand Jury subsequently indicted both Mr. and Mrs. Fitzgerald on 20 counts of embracery on the basis of the letters which Mrs. Fitzgerald sent. They were arraigned on the embracery charge on December 15, 1977, and trial was set for January 3, 1978, at 9:00 a.m. There has been no arraignment on the terroristic threats indictment. The trial date, being set within a month of arraignment, and within two months of indictment, was an unusually early one. Normally, a non-jail case is not heard for approximately five months after indictment. The trial of the Fitzgeralds was scheduled to be heard by Judge Broome, one of the judges who had been a target of the Fitzgeralds' literature. There were indications that he planned to recuse himself but that he intended to call in Judge Blackshear to replace him. The Fitzgeralds had also been extremely critical of Judge Blackshear due to his handling of the Ray Bonner murder case.

A final link between Judge Hendon, Judge Henley, and the Fitzgeralds was forged by plaintiffs' filing suit against Judge Henley. When the civil case came up on motion calendar before Judge Hendon in October, 1977, the Fitzgeralds moved to disqualify all judges in DeKalb County. Judge Hendon refused to recuse even himself. Mr. Fitzgerald moved to withdraw the complaint, and the case was finally dismissed with prejudice.

CONCLUSIONS OF LAW

A hearing was held in this court on January 4 and January 5, 1978, on the question whether a preliminary injunction should be entered in this case. This court having granted a tem-

porary restraining order on January 2, 1978, the defendant moved to dismiss the complaint for failure to state a claim upon which relief can be granted. Defendant bases his motion upon the principles of law enunciated in *Younger v. Harris*, 401, U.S. 37 (1971), which establish the very narrow circumstances in which a federal court may enjoin state court proceedings. Defendant urges that the criminal proceedings against the Fitzgeralds have been brought in good faith, that the Fitzgeralds have a perfectly good state procedure for testing the prosecution – a motion to quash the indictments – and that the Fitzgeralds have an opportunity to vindicate themselves in a single court proceeding inasmuch as Mr. Fitzgerald has not been arraigned for the terroristic threats indictment.

As the defendant correctly points out, *Younger v. Harris* clearly stands for a fundamental principle of federalism – that in the absence of extraordinary circumstances a federal court should not interfere with a state's exercise of its legitimate interest in prosecuting one who has violated the state's law. The *Younger* Court indicated that only unusual situations would call forth an exception to the general rule that a federal court may not enjoin state court proceedings. Generally these are limited to bad faith prosecution and harassment, but the Court gave as an example of other extraordinary circumstances prosecution on the basis of a patently unconstitutional statute. 401 U.S. at 53-54. The Court emphasized that the inconvenience and suffering necessarily incurred by a defendant in a criminal prosecution does not constitute the great and immediate irreparable injury which would justify federal intervention. *Id.* at 46. The opportunity to vindicate oneself in a single state court proceeding is usually adequate protection for the criminal defendant's federally protected rights. It is only when this protection for some reason breaks down that the federal court may intervene. The question before the court is, therefore, not whether Mr. and Mrs. Fitzgerald should be tried for the crime of embracery but whether they will have an opportunity to vindicate themselves through the pending state court proceeding. After long and arduous consideration, this court has concluded that Mr. and Mrs. Fitzgerald may not be able to vindicate themselves in this state court proceeding but are in danger of multiple prosecutions and other forms of harassment as

long as they continue to criticize powerful figures in DeKalb County.

The United States Court of Appeals for the Fifth Circuit has specifically held that a finding of bad faith or harassment is sufficient to establish the irreparable injury necessary for an injunction. *Shaw v. Garrison*, 467 F.2d 113, 120 (5th Cir.), *cert. denied*, 409 U.S. 1024 (1972). Although it is clear that *Younger v. Harris* restrictions on federal interference do not apply in a situation involving harassment or bad faith prosecutions, the question of what constitutes bad faith is essential to a resolution of the present matter. It is clear that bad faith is present in the institution of multiple prosecutions with no opportunity to vindicate oneself in a single proceeding. *Younger v. Harris*, 401 U.S. 37, 49 (1971). Here we have two indictments of one plaintiff which have so far resulted in one criminal prosecution and one indictment of the other plaintiff which has resulted in one criminal prosecution.

This court initially believed that the action taken against the Fitzgeralds up to this point constituted the type of prosecution that could be resolved in a single state proceeding in that only one criminal trial against each defendant is actually scheduled and that in the absence of multiple prosecutions bad faith could not be found. However, there is some authority from the United States Court of Appeals for the Fifth Circuit as to the real meaning of bad faith which has convinced us otherwise. In *Duncan v. Perez*, 445 F.2d 557 (5th Cir.), *cert. denied*, 404 U S. 940 (1971), a black man of nineteen was convicted of a simple battery as a result of his striking a young white boy on the arm. His conviction was overturned in *Duncan v. Louisiana*, 391 U.S. 145 (1968), by the United States Supreme Court on the ground that he had been denied his constitutional right to a trial by jury. Duncan then attempted to obtain an injunction against the state's retrying him. The court affirmed the district court's finding that the state had no interest in retrying Duncan and that the simple battery prosecution by the district attorney was in bad faith and for purposes of harassment. It seems clear, therefore, that multiple prosecutions are not necessary to finding of bad faith prosecution. In *Shaw v. Garrison*, 467 F.2d 113 (5th Cir. 1972), the court found that bad faith was shown in the defendant's prosecution

of Shaw for conspiracy to murder President Kennedy and, following a verdict of not guilty, his prosecuting Shaw for perjury allegedly committed at the first trial. The district court enjoined the perjury prosecution under a finding that it was brought in bad faith and for purposes of harassment. Finding that the district court's finding was not clearly erroneous, the court of appeals affirmed.

The court has concluded that in the case at hand there is grave doubt that plaintiffs could vindicate themselves in regard to the charges against them in a single proceeding. This doubt is raised by the interference of Judge Henley and Judge Hendon in the district attorney's decision whether or not to prosecute. It is also raised by the fact that Judge Hendon, prior to the arraignment on December 8, 1977, contacted the Dean of the Emory Law School concerning the propriety of an Emory professor's representing the plaintiffs. It is raised by Judge Hendon's failure to recuse himself in the Fitzgeralds' civil action against Judge Henley. Finally, it is raised by the fact that the case was scheduled for trial earlier than is usual and was set before a judge of whom plaintiffs had been critical. When Judge Broome finally decided to recuse himself, he indicated that he intended to call in a judge from outside the county. This judge, who had also had dealings with the Fitzgeralds, was apparently chosen over other judges within DeKalb County who had had no previous dealings with the Fitzgeralds. This court is convinced that there exists enough doubt whether plaintiffs can receive a fair trial which will finally resolve the matter that the state court proceeding should be enjoined.

The court is persuaded that the prosecution of the Fitzgeralds has been in bad faith and for purposes of harassment with the intention of chilling their first amendment rights. It is thus unnecessary for the court to address the question whether there is any reasonable expectation of conviction of terroristic threats under Georgia law. *Lanthrip v. State*, 235 Ga. 10 (1975). It is also unnecessary to address the very real question of whether Mr. Fitzgerald could be convicted on the embracery charge since it is doubtful whether he knew of Mrs. Fitzgerald's communication to the September-October Grand Jury. It is, finally, unnecessary to address the issue of whether the actions

of Mrs. Fitzgerald constituted the crime of embracery inasmuch as there has been no allegation that she intended to bribe or corrupt the grand jury. *Jones v. State,* 101 Ga. App. 851 (1960). Inasmuch as the court has determined that the pending indictments are infected by the bad faith of defendant, defendant should be and is hereby enjoined from prosecuting plaintiffs on these indictments. The clerk is ordered to enter final judgment for the plaintiffs in this matter.

IT IS SO ORDERED this 22nd day of June, 1978.

WILLIAM C. O'KELLEY
United States District Judge

UNITED STATES DISTRICT COURT
For The
Northern District of Georgia – Atlanta Division

Civil Action File No. C77-2074A

Ernest Billy Fitzgerald and
Marilyn Fitzgerald
vs.
M. Randall Peek, District Attorney
of the Stone Mountain Judicial Circuit,
individually and in his official capacity

JUDGMENT

This action came on for consideration before the Court, Honorable William C. O'Kelley, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that Defendant M. RANDALL PEEK, District Attorney of Stone Mountain Judicial Circuit, individually and in his official capacity, is enjoined from prosecuting plaintiffs ERNEST BILLY FITZGERALD and MARILYN FITZGERALD on stated indictments; and that plaintiffs Ernest Billy Fitzgerald and Marilyn Fitzgerald recover of plaintiff M. Randall Peek, their costs of action.

Dated at Atlanta, Georgia, this 22nd day of June, 1978.

BEN H. CARTER
Clerk of Court
By Sheila Sewell
Deputy Clerk

FILED AND ENTERED
IN CLERK'S OFFICE
June 22, 1978
BEN H. CARTER, Clerk
By Sheila Sewell
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

ERNEST BILLY FITZGERALD and MARILYN FITZGERALD, **Plaintiffs,**	)	
vs.	)	**CIVIL ACTION No. C77-2074A**
M. RANDALL PEEK, District Attorney of the Stone Mountain Judicial Circuit, individually and in his official capacity, **Defendants**	)	

COMPLAINT

Jurisdiction

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331, 1343, 2201, 2202; 42 U.S.C. § 1982; 1988, and the First and Fourteenth Amendments to the United States Constitution. This is a civil suit seeking to enjoin and redress the deprivation, under color of state law, of the rights, privileges, and immunities of plaintiffs under the United States Constitution. Plaintiffs seek a temporary restraining order, a preliminary injunction, a permanent injunction, attorney's fees, and any other necessary and proper relief. The amount in controversy exceeds $10,000, exclusive of interests and costs.

Parties

2. Plaintiffs, Ernest Billy Fitzgerald and Marilyn Fitzgerald, are citizens of the United States and the State of Georgia. They are husband and wife and reside together at 101 Tree View Lane, Apartment A, Decatur, Georgia 30034.

3. Defendant, M. Randall Peek, is the District Attorney for the Stone Mountain Judicial Circuit which covers DeKalb and Rockdale Counties in the State of Georgia. In that capacity he is responsible for presenting potential criminal cases to the Grand Jury and prosecuting cases in which the Grand Jury returns an indictment.

Facts

4. Mr. Fitzgerald was an extremely vocal and active critic of former DeKalb County Sheriff Rayburn L. Bonner. Prior to the Republican Primary of August 10, 1976, in which Mr. Bonner was defeated in his bid for reelection, Mr. Fitzgerald personally campaigned heavily against Mr. Bonner and distributed thousands of leaflets that accused Mr. Bonner of dishonesty in office and improper and illegal behavior in his private life. Mr. Bonner later claimed that his defeat in the primary was directly attributable to Mr. Fitzgerald's efforts.

5. On Thursday, September 2, 1976, while he was still Sheriff of DeKalb County, Mr. Bonner swore out a warrant (Exhibit A) charging Mr. Fitzgerald with making terroristic threats against him (Georgia Code 26-1307) and with criminal defamation (Georgia Code 26-2804) during the primary campaign. The terroristic threat supposedly was made during a telephone call from Mr. Fitzgerald to the DeKalb County Police Department on the morning of September 1, 1976. Despite the fact that Mr. Fitzgerald was in police custody on a charge of driving under the influence of alcohol from the evening of September 1, 1976 until approximately 2:00 p.m. on September 2, 1976, Sheriff Bonner deliberately delayed serving the warrant on him until approximately 2.00 a.m. on Saturday, September 4, 1976. Due to the timing of the arrest, bond was not set on the charges until Tuesday, September 7, 1976, after Labor Day, causing Mr. Fitzgerald to spend more than three days in jail without being given the opportunity to make bond.

6. Bonner's charges remained pending against Mr. Fitzgerald from September 1976 until August 24, 1977. During this time, Mr. and Mrs. Fitzgerald and their daughter, Dawn Moore, were assured on several occasions by the defendant that the charges against him would be dropped as soon as a murder case that

was pending against Mr. Bonner had been resolved. Meanwhile, Mr. Fitzgerald had sworn out warrants against Mr. Bonner for false swearing and tampering with the evidence by substituting a second warrant for the first one sworn out against Mr. Fitzgerald (Exhibit B).

7. On August 28, 1977, a preliminary hearing was held before Judge Tom Moran, Magistrate of DeKalb County, on the charges pending against Mr. Fitzgerald and Mr. Bonner. The defendant was represented by Assistant District Attorney, Mike Sheffield. A transcript was made of this hearing (Exhibit C) which shows that after a conference participated in by Mr. Sheffield, Judge Moran, the Attorney for Mr. Bonner, and the Attorney for Mr. Fitzgerald, it was determined that all pending charges would be dropped. Mr. Sheffield not only concurred in dropping the charges, but stated that a conviction on the terroristic threats charge was not possible because the threats involved had been made, not to Bonner, but to a third party, and therefore did not constitute the crime of terroristic threats.

8. Shortly thereafter, Mr. Fitzgerald learned that despite the preliminary hearing the defendant intended to ask the September-October Grand Jury to return an indictment against him on the charge of making terroristic threats against Rayburn L. Bonner. Mr. and Mrs. Fitzgerald confronted the defendant on or about September 2, 1977, and asked him why he had made this decision after having promised to dismiss the charge and after the agreement to dismiss by his assistant at the preliminary hearing. The defendant replied that Superior Court Judges E. T. Hendon and Clyde Henley had come to him and told him that the charges against Mr. Fitzgerald should be presented to the Grand Jury and that he had to honor their wishes. Mr. Fitzgerald had a long-standing personal dispute with Judge Hendon, had campaigned vigorously against him in the 1976 primary and general election; and had distributed leaflets accusing him of serious personal misconduct. Judge Henley had been Judge Hendon's law partner, and Mr. Fitzgerald had also campaigned strongly for his opponent in the 1976 judicial election. In addition, the plaintiffs had done substantial research on the criminal cases which E. T. Hendon, as an attorney, had handled before his former law partner Clyde Henley

in an effort to show that they had been improperly handled. They had shown this research to, among others, members of the July-August Grand Jury.

9. On or about September 8, 1977, the plaintiff's daughter, Dawn Moore, went to speak with Robert Wilson, the Assistant District Attorney in charge of dealing with the September-October Grand Jury. They discussed the charge concerning her father at some length. Mr. Wilson knew that Mrs. Fitzgerald had written to an earlier Grand Jury concerning charges that she thought should be brought against Rayburn L. Bonner and asked Mrs. Moore whether her mother was going to send another letter. Mrs. Moore said that she did not know and asked what he would think about such a letter. Mr. Wilson replied, "It wouldn't hurt." Mrs. Moore then relayed this message to her mother. On or about September 9, 1977, a letter with the transcript of the preliminary hearing and other enclosures purporting to come from Mrs. Fitzgerald (Exhibit D) was sent to most of the members of the September-October Grand Jury. Mr. Fitzgerald did not participate in drafting this letter in any way and did not know that it was being sent. Shortly thereafter, the Grand Jury returned a "no-bill" on the charge against Mr. Fitzgerald.

10. On September 6, 1977, Mr. Fitzgerald instituted *pro se*, a civil action against Judge Clyde Henley, charging him with improperly exercising influence over the defendant to present charges against Mr. Fitzgerald before the Grand Jury. He dismissed this complaint on October 31, 1977, when Judge E. T. Hendon, who was alleged in the complaint to have participated in the improper exercise of influence, declined to recuse himself from hearing motions in the case.

11. Defendant then asked the November-December Grand Jury to indict Mr. and Mrs. Fitzgerald on twenty counts of embracery (Georgia Code § 26-2407) based solely on the letter which Mrs. Fitzgerald had supposedly sent to twenty members of the September-October Grand Jury. The indictments were returned on November 9, 1977. Shortly thereafter, defendant asked the Grand Jury a second time to indict Mr. Fitzgerald for making terroristic threats against Rayburn L. Bonner. The indictment was returned on or about December 2, 1977.

12. On or about December 5, 1977, shortly before Mr. and Mrs. Fitzgerald were arraigned on the twenty counts of embracery, Judge E. T. Hendon called Dean L. Ray Patterson of Emory Law School and asked whether Frank P. Samford, III, one of the attorneys for the plaintiffs, was a full professor at Emory. When told that Mr. Samford was an Associate Professor, Judge Hendon asked whether there were any restrictions on the handling of cases by Emory Law teachers. Judge Hendon was not scheduled to arraign the plaintiffs or to try them. His contact with Dean Patterson had nothing to do with his duties as a Superior Court Judge.

13. Plaintiffs are now scheduled to be tried on the embracery counts on January 3, 1978, before Circuit Judge Broome. Judge Broome is a close friend of Judges Henley and Hendon. In addition, Mrs. Fitzgerald distributed a flyer that was very critical of Judge Broome's handling of a murder charge against Judge Henley's former son-in-law and Mr. Fitzgerald in October 1977 made a number of very serious allegations to people working in the DeKalb County Courthouse regarding Judge Broome's prior conduct. Plaintiffs have moved to disqualify Judge Broome and Bob Wilson, the Assistant District Attorney scheduled to try the case. They have also moved to dismiss the charges against them on various grounds including prosecutional misconduct. However, the motions are scheduled to be heard at the same time as the trial. Judge Broome has indicated informally that he will disqualify himself, but has not yet entered an order to that effect. Mr. Fitzgerald has not been arraigned on the terroristic threats charge, and no trial date has been set.

14. The indictments against plaintiffs were not obtained with any expectation that valid convictions could be obtained against them. Defendant is aware of Georgia appellate decisions interpreting both statutes which indicate that what the plaintiffs are alleged to have done would not constitute a crime. Defendant is also aware that the communication to the Grand Jury which forms the basis for the embracery charge is protected by the First Amendment as interpreted by the Court in *Woods v. Georgia,* 370 V.S. 375, 389-92 (1962). Finally, the defendant has no evidence connecting Mr. Fitzgerald with the alleged communication with Grand Jurors and, nevertheless, in bad

faith, asked for and received an indictment of him for the purpose of harassment.

15. The charges against plaintiffs are being prosecuted at the insistence of two judges of the Superior Court of DeKalb County who are political enemies of the plaintiffs. The sole purpose of the prosecution is to punish plaintiff for having exercised their First Amendment rights in criticizing public officials in DeKalb County and to deter them from future exercise of those rights.

Cause of Action

16. Defendant has violated plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution by, in bad faith and for purposes of harassment, pressing charges against them that he knows cannot form the basis for a proper conviction. His sole reason for pursuing these charges is to punish plaintiffs for having exercised their First Amendment rights and to deter them from future exercise of these rights.

WHEREFORE, the premises considered, plaintiff prays that this Honorable Court:

1. Assume jurisdiction of this cause and set it down promptly for a hearing.

2. Pending a hearing of this cause, grant a temporary restraining order restraining defendant, his successors in office, his agents and employees, and all other persons acting in concert with him from prosecuting plaintiffs on the indictments for embracery and terroristic threats now pending against them.

3. Enter preliminary and permanent injunctions, pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining defendant, his successors in office, his agents and employees, and all other persons acting in concert with him from prosecuting plaintiffs on the indictments for embracery and terroristic threats now pending against plaintiffs.

4. Enter a final judgment declaring that defendant's prosecution of plaintiffs on the indictments now pending against them violates their rights under the First and Fourteenth Amend-

ments to the United States Constitution.

5. Tax the costs of this action against defendant.

6. Award plaintiffs attorneys' fees pursuant to 42 U.S.C. § 1988.

7. Grant any further, different, or alternative relief to which the plaintiffs may be entitled in the premises.

Respectfully submitted,

Frank P. Samford, III
Emory Law School
Gambrell Hall
Atlanta, Georgia 30322
Telephone 292-1128

Judith M. Moore
129 Shadowmoor Drive
Decatur, Georgia 30030
Telephone 377-3941

ATTORNEYS FOR PLAINTIFFS

VERIFICATION

ERNEST BILLY FITZGERALD, being duly sworn, deposes and says that he resides at 101 Tree View Lane, Apartment A, Decatur, Georgia 30034; that he is the plaintiff herein; that he has read the foregoing complaint and knows the contents thereof and that the same are true of his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

s/ Ernest Billy Fitzgerald

SWORN to before me this
30th day of December, 1977.

s/ Bernice B. Byrd
Notary Public
My Commission expires: July 31, 1978.

VERIFICATION

MARILYN FITZGERALD, being duly sworn, deposes and says that she resides at 101 Tree View Lane, Apartment A, Decatur, Georgia 30034; that she is the plaintiff herein; that she has read the foregoing complaint and knows the contents thereof and that the same are true of her own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters she believes them to be true.

s/ Marilyn Fitzgerald

SWORN to before me this
30th day of December, 1977.

s/ Bernice B. Byrd
Notary Public
My Commission expires July 31, 1978.

EXHIBIT A

CRIMINAL WARRANT **58767**

STATE OF GEORGIA, DEKALB COUNTY:

Personally appeared before the undersigned prosecutor, who, being sworn on oath says that to the best of his knowlede and belief, ERNEST BILLY FITZGERALD, Defendant herein, did commit the offense of terroristic threats and acts (26-1307); did threaten to commit the crime of murder, a crime of violence, with the purpose of terrorizing Sheriff Rayburn (Ray) L. Bonner, in said County on or about September 1, 1976, and the undersigned prosecutor makes this affidavit that a warrant may issue for his arrest.

s/ Rayburn L. Bonner
Sheriff, DeKalb County
Prosecutor

Sworn to and subscribed before me,
this September 2, 1976.

s/ J. E. Kirkland
Clerk, Recorders Court of DeKalb County,
Magistrate Division.

STATE OF GEORGIA, DEKALB COUNTY:

To any Sheriff or his deputy, Coroner, Constable, or Marshal of said State, GREETING:

For sufficient cause made known to me you are hereby commanded to arrest the defendant named in the foregoing affidavit charged by the prosecutor therein with the offense against the laws of this State named in said affidavit and bring him before me or some other Judicial officer of this State to be dealt with as the law directs.

Herein fail not. This September 2, 1976.

s/ J. E. Kirkland
Clerk, Recorders Court of
DeKalb County,
Magistrate Division

EXHIBIT B

CRIMINAL WARRANT

STATE OF GEORGIA, DEKALB COUNTY:

Personally appeared the undersigned prosecutor, who, being sworn on oath, says that to the best of his knowledge and belief ERNEST BILLY FITZGERALD, W/M, DOB: 1/6/30, Defendant herein, did commit the offense of TERRORISTIC THREATS AND ACTS, VIOLATION OF GA. CODE SEC: 26-1307, in that the said named Ernest Billy Fitzgerald, did threaten to commit the crime of murder, a crime of violence, with the purpose of terrorizing, Sheriff Rayburn (Ray) L. Bonner, in said County on or about September 1st, 1976, and the undersigned prosecutor makes this affidavit that a warrant may issue for his arrest.

s/ Rayburn L. Bonner
Sheriff, DeKalb County
Prosecutor.

Sworn to and subscribed before me,
Charles W. Smegal,
Clerk, Recorders Court,
DeKalb County

STATE OF GEORGIA, DEKALB COUNTY:

To any Sheriff or his deputy, Coroner, Constable, or Marshal of said State, GREETING:

For sufficient cause made known to me you are hereby commanded to arrest the defendant named in the foregoing affidavit charged by the prosecutor therein with the offense against the laws of this State named in said affidavit and bring him before me or some other Judicial officer of this State to be dealt with as the law directs.

Herein fail not. This 3rd day of September, 1976.

s/ Charles W. Smegal
Clerk, Recorders Court,
DeKalb County
Magistrate Division

EXHIBIT C

IN THE MAGISTRATES COURT
FOR THE COUNTY OF DEKALB
STATE OF GEORGIA

THE STATE OF GEORGIA	**) (Motion to Quash.**
	) Motion to Dismiss.)
versus	)
	)
ERNEST BILLY FITZGERALD,	)
Defendant	)

The transcript of the proceedings pertaining only to the above-styled case, heard before THE HONORABLE TOM MORAN, Judge, commencing at approximately 10:05 a.m., August 24, 1977, Magistrates Court, 4415 Memorial Drive, Decatur, DeKalb County, Georgia.

APPEARANCES:

Mike Sheffield, Esquire
Attorney for the State

James R. Venable, Esquire
Attorney for the Defendant

.....

THE COURT: All right. Mr. Venable, do you have a closing argument?

MR. VENABLE: No, sir. I don't care to reply to it, Your Honor.

THE COURT: All right. For the record I will overrule the motion to quash and the motion to dismiss Criminal Warrant Number 58766 and 58767 on each and every ground enumerated therein as statutory authority exists for the creation of the Recorder's Court of DeKalb Coynty, which this is, and for the issuance of warrants by the clerk of that court. Such statutory authority has been upheld by the Supreme Court of the United States as early as 1969.

Has Mr. Worozbyt come into court yet?

MR. WOROZBYT: May it please the Court.

THE COURT: All right. At this time we will take a five minute recess. I'd like to see Mr. Worozbyt and Mr. Venable in chambers.

(Recess.)

THE COURT: At this time the Court will go into the two criminal warrants, Criminal Warrant Number 58766, Criminal Warrant Number 58767, which concern the Defendant Ernest Billy Fitzgerald. Warrant Number 58767 charges the Defendant, Ernest Billy Fitzgerald, with the charge of terroristic threats and that warrant alleges that on September 1st, 1976 Ernest Billy Fitzgerald did threaten to commit the crime of murder, a crime of violence, for the purpose of terrorizing Sheriff Rayburn L. Bonner. Criminal Warrant Number 58766 alleges that on January 1st, 1976 through August 30th, 1976 the Defendant, Ernest Billy Fitzgerald, committed the offense of criminal defamation in violation of Georgia Code Annotated, 26-2804 and that the named Defendant did without privilege and with intent to defame Rayburn L. Bonner communicate the following false matters, to wit, passing out defaming literature which exposed that person to hatred, contempt and ridicule. The State of Georgia is represented by the Assistant District Attorney, Mr. Sheffield, and the Defendant is represented by Mr. Venable.

All right. Are there any motions or stipulations in this

matter?

MR. VENABLE: I'd like to make a motion on the terroristic threats, Your Honor, to dismiss this on the grounds that I believe the evidence would show that it was made to a third party and therefore we contend that that would not constitute an offense of a terroristic threat, that it was not made directly to the prosecutor, that is, Mr. Bonner, Your Honor.

On the other warrant, I've read a great deal of decisions and I cannot find anything where that would constitute a crime. I don't believe it would, Your Honor. It's too vague, uncertain and indefinite.

Therefore, we make a motion to dismiss these two warrants in behalf of Mr. Fitzgerald in the State versus Fitzgerald.

THE COURT: What do you say to that?

MR. SHEFFIELD: Your Honor, the State would concur with Mr. Venable's motion as far as the terroristic threat warrant. We've discussed the case with witnesses and Mr. Venable is correct. The threats were made to a third party. They were not made to Mr. Bonner himself. We would concur in this motion to dismiss that warrant as not constituting the crime of terroristic threats.

As for the warrant charging Mr. Fitzgerald with criminal defamation we would concur with Mr. Venable that that more properly be brought as a civil case.

THE COURT: All right. Mr. Venable, the State has concurred with your motion and I will grant the motion to dismiss Criminal Warrant Number 58767, terroristic threats, violation of Georgia Code Annotated 26-1307, and Criminal Warrant Number 58766, criminal defamation. This matter is closed.

(Proceedings concluded.)

3031 Crabapple Circle
Decatur, Georgia 30034
284-9407

September 9, 1977

Ladies and Gentlemen of the Grand Jury:

On September 4, 1976, Labor Day weekend, my husband was arrested and held until September 7, 1977, with any bond being denied during his incarceration. The bond, when finally set on the 7th, was for $10,000.00. And all of this for an "alleged" phone call to someone regarding Rayburn L. Bonner.

After almost one year of:

1. asking numerous times for a preliminary hearing,
2. finding and exposing two different sets of warrants for these charges all having different dates and different judges issuing them, and,
3. only two days' notice of a hearing

all charges were dismissed by the State through Judge Tom Moran, on August 24, 1977. (See attached transcript.)

Also, at this same hearing my husband and his attorney felt it best to dissolve the matter completely and dropped all charges against Bonner, which were that of Tampering with the Evidence and False Swearing. Mr. Bonner was released of his bail – $500.00 – and my husband was release of his bail – $10,000.00 – and is not now presently under any charge whatsoever.

On September 2, 1977, my husband and I were informed by the District Attorney, Randall Peek, that the "State" was now going to open up the case and present it to you, the Grand Jury. When we questioned this, Mr. Peek told us that Judges Henley and Hendon were not satisfied with the decision of Judge Moran and that they wanted it presented to you. However, after our suit against Judge Henley was filed on September 7, 1977, Mr. Peek said (See attached Atlanta Constitution clipping dated September 8, 1977) that Bonner's lawyer, Mr. Worozbyt, denied having agreed to the dismissal, and that he wanted to further pursue the matter.

If you will note on pages 9-11 of the enclosed transcript,

Mr. Worozbyt and Mr. Venable, our attorney, went into the chambers of Judge Moran, and after this brief meeting, the actual proceedings took place. A motion was made to dismiss by our attorney, this was agreed to by the State's prosecutor, Assistant District Attorney Sheffield, and the State, through Judge Moran, closed the case. I'm sure you must see that at no time in open court did Mr. Worozbyt object to this dismissal. He, as an officer of the court, had every right and priviledge to object at that time, but as you can well see, he did not.

So who is behind the push to open up this case again?

Prior to the date of the incident in question, my husband outspokenly campaigned against Mr. Bonner, Judge Henley and Judge Hendon. They often outspokenly expressed their dislike of my husband, as well. Many things were exposed about these people to the press, the public, as well as to the last session of the DeKalb County Grand Jury. There were even some Grand Jury members present at my husband's preliminary hearing who cannot now believe what is trying to be done. I will gladly give you the names of those from the Jury who were working on the committee regarding my correspondence and allegations about these men, if you so desire.

I humbly ask that you, as Grand Jurors, try to ascertain for yourselves why this matter is being brought to your attention. I beg each of you, since we cannot be present to defend ourselves, to review and weigh all of the evidence carefully before making your decision. The members of the last Jury found enough credence about what I have said about these people to come to my home, as well as to come to the hearing. All we really want is for justice to be done.

The State arrested my husband. The State incarcerated him for three and one-half days. The State put him under excessive bond, in comparison to others even in murder cases, and held this bond over our heads for almost one year. The State held a preliminary hearing. And finally, the State dismissed the charges to no one's objection. So, please ask your-

self why the "State" now wishes to continue this case, when others so blatantly receive favoritism If the State had felt this case should go before you, then on August 24, 1977, it would have ruled so. But the State, through a detached and neutral judge, ruled "This matter is closed."

Thank you very much.

Sincerely,

s/ Mrs. Marilyn M. Fitzgerald

Enclosures

P.S. This letter is being sent to you without the knowledge of my husband due to mental strain he is now under, and has been under since September 4, 1976.

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

MARILYN M. FITZGERALD and ERNEST BILLY FITZGERALD, Plaintiffs,	**CIVIL ACTION FILE NO. 77-2246**
VS	**COMPLAINT**
CLYDE WESLEY HENLEY, Defendant.	

Comes now the plaintiffs in the above styled case and shows the court the following:

1.

Defendant herein is Clyde Wesley Henley, Superior Court Judge of DeKalb County, who resides at 4003 Flintridge Drive, Stone Mountain, Georgia 30083, and that the defendant is subject to the jurisdiction of the DeKalb Superior Court.

2.

Plaintiffs charge that defendant did with malice, hatred and personal prejudice, with the aide of Superior Court Judge E. T. Hendon, impose his will upon the District Attorney of DeKalb County, Randall Peek, to relate to the plaintiffs on September 2, 1977, the defendant's request to take the co-plaintiff, Ernest Billy Fitzgerald, before the Grand Jury on charges which were dismissed by Magistrate Tom Moran and agreed to by the State's prosecutor, Assistant District Attorney Sheffield, on August 24, 1977, in the Magistrates Court of DeKalb County.

3.

The plaintiffs will show to the court that the defendant used his position as an elected judicial officer to impose his will and personal prejudice on the District Attorney due to the following facts:

a. That plaintiff, Marilyn M. Fitzgerald, sent out information to the press, public and other DeKalb County officials relating to the fact that the defendant set a $5,000.00 bond for Rayburn L. Bonner within hours after the shooting of James Timothy Nix. This was done to show to the public that unjust and undue bond of $10,000.00 was placed upon the co-plaintiff, Ernest Billy Fitzgerald, for an alleged phone call.

b. That the plaintiff, Marilyn M. Fitzgerald, sent out information to the press, public and other DeKalb County officials relating the fact that accused murderer, Harold Walter Hinton, was the former son-in-law of the defendant, as well as to point out the fact that the defendant's former law partner and former attorney for Hinton in his divorce proceedings from the defendant's daughter, and now Superior Court Judge, E. T. Hendon, set bond for the accused murderer at $5,000.00. Thus, showing another parallel between the co-plaintiff's bond of $10,000.00 for an alleged phone call and that of an accused murderer. Shortly after Hinton's release on bond, he was arrested by Federal and State authorities in the State of Alabama on severe drug charges, with the street value of such drugs amounting to millions of dollars. Because of this drug arrest, as well as his previous arrest record, Hinton was sentenced to eight years by the State of Alabama and four years by the Federal Government. On August 31, 1977, an article appeared in the *Atlanta Journal* stating that Harold Walter Hinton was the former son-in-law of the defendant, and that he pled guilty to a lesser charge of involuntary manslaughter, and that this lesser plea was accepted by the District Attorney Randall Peek.

c. That the plaintiff, Marilyn M. Fitzgerald, did on August 9, 1977, send a letter to the DeKalb County Grand Jury asking for an investigation into the judicial system of DeKalb County, and more specifically into the activities of Superior Court Judge Clyde Wesley Henley. She also sent along with her letter a copy of the defendant's lengthy police record to show that he was a convicted felon, as well as to prove that she knew what she was inferring. Also in her letter, she asked for ar investigation into the evidence suppressed by Randall Peek, District Attorney, in the *State v. Bonner* murder trial. Members of the Grand Jury came to the plaintiffs' home and were shown

the numbers of cases whereby the defendant's ex-law partner, E. T. Hendon, now a DeKalb County Suprior Court Judge, as well as other attorneys in his firm, brought clients before the defendant, many for drug related charges, and that deals were made between the defendant and E. T. Hendon and others, to have their clients' charges reduced or totally dismissed. There was also a tape played to the members of the Grand Jury of a phone conversation between the co-plaintiff, Ernest Billy Fitzgerald, and the defendant, whereby the defendant stated to the co-plaintiff that he never heard any cases in his courtroom that were being handled by E. T. Hendon. The Grand Jury was also presented with other evidence regarding Harold Walter Hinton in an effort to show that Hinton, with his extensive arrest record, should not have been put under any bond, and that he was put under bond only because he was the former son-in-law of the defendant, and that the defendant invoked his will upon his friend and ex-law partner, now Superior Court Judge E. T. Hendon.

4.

Co-plaintiff, Ernest Billy Fitzgerald, was arrested on September 4, 1976, by warrants signed by then Sheriff Rayburn L. Bonner and was confined to the DeKalb County jail for almost four days and was denied bond during that time. All of this occurred because of an alleged phone call. Bond of $10,000.00 was finally set on September 7, 1976, by Superior Court Judge Curtis V. Tillman, without any evidence of being produced of a violation of any State Law. After almost one year of pleading with the District Attorney, Randall Peek, to have a preliminary hearing on the matter, and upon only two days' notice, a hearing was held in the Magistrates Court of DeKalb County on August 24, 1977, Magistrate Tom Moran presiding. All charges against the co-plaintiff, Ernest Billy Fitzgerald, were dismissed by Judge Moran, and this was agreed to in open court by the State's prosecutor, Assistant District Attorney Sheffield. The co-plaintiff, Ernest Billy Fitzgerald, was then released from the $10,000.00 bond under which he was being held. Rayburn L. Bonner and his attorney Ted Worozbyt were also present in the courtroom and neither Bon-

ner nor Worozbyt made any objections to the co-plaintiff's attorney's motion to dismiss nor to the ruling for dismissal by Judge Moran. Also at this time, charges by the co-plaintiff, Ernest Billy Fitzgerald, against Rayburn L. Bonner for False Swearing and Tampering with Evidence involving two completely different sets of warrants for the same charge, were dropped and ruled on by Judge Moran, with no objections by the co-plaintiff, Ernest Billy Fitzgerald or his attorney, James R. Venable.

5.

Plaintiffs, therefore, charge the defendant with imposing his personal prejudice and hatred for the co-plaintiff, Ernest Billy Fitzgerald, upon the District Attorney to subject the plaintiffs to further humiliation, embarrassment, and harassment, as well as to force the plaintiffs to incur further legal expenses on a charge that was dismissed on August 24, 1977. Plaintiffs contend that defendant has a personal vendetta against one or each of the plaintiffs because of the co-plaintiff's, Marilyn M. Fitzgerald, actions as outlined in No. 3 above. And the plaintiffs further contend that since all of the information sent out by co-plaintiff, Marilyn M. Fitzgerald, is true, that the defendant cannot seek legal recourse for slander against her, and thus, must vent his personal anger and hatred against her husband, the co-plaintiff, Ernest Billy Fitzgerald.

In the *State v. Guhl,* 52543, and in *Mitchell v. The State* et. vice versa, *Ga. App., 140,* p. 23, the defendant herein was shown not to have been detached and neutral, as is the test of a magistrate. The defendant also was shown and proven to have discussed with the district attorney and his staff regarding the appellees. The defendant was also shown and proven to have expressed unfavorable opinions regarding the honesty and credibility of the appellees. "The evidence abundantly authorized the conclusion that Judge Henley had become so affiliated with the district attorney's investigatory and prosecutorial functions with the special investigative grand jury as to warrant his disqualification." Therefore, the plaintiffs conclude that the defendant, as in the aforementioned case, is acting with undue authority, personal prejudice and hatred against the co-plaintiff, Ernest Billy Fitzgerald, and is using the auspices of

his robe, the district attorney's office, as well as the entire judicial system to invoke his own will upon the plaintiffs, causing them to suffer extreme mental pain and anguish.

WHEREFORE, plaintiffs pray that process issue with service upon the defendant as by law provided, and that they have judgment against the defendant, and that they be awarded for punitive damages the just sum of TWO MILLION DOLLARS ($2,000,000.00), as well as court costs and attorneys fees. The plaintiffs further pray that:

1. The defendant and/or his agents stop any personal harassment of the plaintiffs through any part of the judicial system of DeKalb County;

2. The defendant be ordered to refrain from imposing his personal opinions and will upon the district attorney or any members of the district attorney's staff,

3. The plaintiffs have a trial by jury;

4. Due to the fact that the defendant is a Superior Court Judge in DeKalb County, that a change of venue be granted to the plaintiffs.

s/ Marilyn M. Fitzgerald
Co-Plaintiff

s/ Ernest Billy Fitzgerald
Co-Plaintiff

3031 Crabapple Circle
Decatur, Georgia 30034
284-9407

Sworn to and subscribed before me this
6th day of September, 1977.

s/ Dawn F. Moore
Notary Public

STATE OF GEORGIA
COUNTY OF DEKALB

Personally appeared before the undersigned attesting officer, duly authorized by law to administer oaths, MARILYN M. FITZGERALD, who, after first being sworn, deposes and says on oath that the facts contained in the foregoing complaint are true.

s/ Marilyn M. Fitzgerald

Sworn to and subscribed before me, this
6th day of September, 1977.

s/ Dawn F. Moore
Notary Public

STATE OF GEORGIA
COUNTY OF DEKALB

Personally appeared before the undersigned attesting officer, duly authorized by law to administer oaths, ERNEST BILLY FITZGERALD, who, after first being sworn, deposes and says on oath that the facts contained in the foregoing complaint are true.

s/ Ernest Billy Fitzgerald

Sworn to and subscribed before me, this
6th day of September, 1977.

s/ Dawn F. Moore
Notary Public

DEKALB DEATH BRINGS GUILTY PLEA

The former son-in-law of a DeKalb County Superior Court judge has pleaded guilty to involuntary manslaughter before another DeKalb judge.

Harold Walter Hinton, 36, of Lithonia entered the plea Tuesday before Judge Robert K. Broome in a case involving the March 2 shooting death of Myra Ellen Richardson, 23, of Decatur.

Hinton, who Dist. Atty. Randall Peek confirmed was formerly the son-in-law of Judge Clyde Henley, was indicted May 17 for murder, court records show.

Peek recommended reduction of the charge to involuntary manslaughter, which carries a maximum sentence of five years, because he said the evidence in the case wasn't strong enough to support a murder charge.

Hinton told authorities that Ms. Richardson was shot during an argument when he and the woman were struggling for a pistol, Peek said.

Broome accepted the guilty plea and said he would sentence Hinton after a pre-sentence investigation was completed."

JUDGE ACCUSED OF MISCONDUCT

by Emma Edmunds

A Decatur couple has accused DeKalb County Superior Court Judge Clyde Henley of using his position as an elected official to impose "his will and personal prejudice" on the DeKalb district attorney.

Marilyn and Bill Fitzgerald charged in the complaint that Henley "with malice, hatred and personal prejudice," and the aid of Superior Court Judge E. T. Hendon, asked that Bill Fitzgerald be taken before the grand jury on charges already dismissed by Magistrate Tom Moran. The dismissal, they contend, was agreed to by the state's prosecutor, Assistant Dist. Atty. Mike Sheffield, on Aug. 24 in Magistrate's Court.

Henley had no comment on the complaint filed against him by the Fitzgeralds, his longtime and vigorous critics.

Dist. Atty. Randall Peek confirmed that the matter, believed to have been settled in magistrate's court, was to be taken to the grand jury but denied that Henley played any part in the decision.

Peek said the results of the magistrate's court proceedings – in which there was no sworn testimony – reportedly have been questioned by one of the attorneys involved.

Fitzgerald, also a longtime and outspoken opponent of former DeKalb Sheriff Ray Bonner, had been charged by the former sheriff with making terroristic threats against his life.

But on Aug. 24, DeKalb Magistrate Tom Moran dismissed the charges against Fitzgerald, who was accused of calling DeKalb Police Chief Dick Hand last year to threaten Bonner's life.

Peek said he had understood at first that Bonner's and Fitzgerald's attorneys had agreed in a closed meeting with the magistrate to dismiss several charges, including warrants charging Fitzgerald with criminal defamation and warrants taken out by Fitzgerald charging Bonner with false statements and tampering with evidence.

But according to Peek, Bonner's attorney, Ted Worozbyt,

later denied having agreed to the dismissal.

Assistant Dist. Atty. Bob Wilson said he had been instructed "to see the case is presented in the very near future, Monday or Tuesday, to the grand jury of DeKalb County."

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with three copies of this pleading by depositing in the United States Mail three copies in a properly addressed envelope with adequate postage thereon.

This 14th day of April, 1981.

Terry T. Coles
Attorney for Petitioner

Office-Supreme Court, U.S.
FILED
MAY 18 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1721

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

M. RANDALL PEEK,

Petitioner,

v.

ERNEST BILLY FITZGERALD

and

MARILYN FITZGERALD,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

FRANK P. SAMFORD, III
Attorney for Respondents
Suite 742 First National Bank Bldg.
Decatur, Ga. 30030
(404) 377-5126

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NO. 80-1721

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

M. RANDALL PEEK,

Petitioner,

v.

ERNEST BILLY FITZGERALD
and
MARILYN FITZGERALD,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Respondents do not accept the statement of the case presented by petitioner. It is in many respects inaccurate and incomplete, as is apparent from reading the opinions of the district judge and the Fifth Circuit Court of Appeals. These inaccuracies and omissions are important because they are likely to mislead the Court concerning the need for hearing this case on a petition for certiorari. Consequently, respondents are presenting their own statement of the case.

Respondents filed suit in the Federal District Court for the Northern District of Georgia seeking to enjoin petitioner from prosecuting them on criminal charges in

the Superior Court of DeKalb County, Georgia. They sought a temporary restraining order, a preliminary injunction, a permanent injunction, and declaratory relief. (R. 3-9) The complaint alleged that petitioner had instituted and was prosecuting the state criminal charges against them in bad faith. Federal jurisdiction was based on 28 USC §§1331, 1343, 2201, 2202; on 42 USC §§1983, 1988; and on the First and Fourteen Amendments to the United States Constitution. A hearing was held on the temporary restraining order motion on December 31, 1977 in the chambers of Judge William C. O'Kelley. Petitioner, a lawyer, was notified of this hearing but declined to appear. A telephone conference was held with petitioner's assistant, who was out of the state, before a decision was reached. (R. 34) A temporary restraining order was entered on January 2, 1978. (R. 34-38)

A two-day hearing on the motion for injunctive relief was held beginning on January 3, 1978. Petitioner was given the opportunity to have more time to prepare for this hearing by Judge O'Kelley, but indicated that he preferred to proceed with the hearing immediately. (R. 133) A final order granting respondents the requested injunctive relief was issued by Judge O'Kelley on June 22, 1978. Petitioner appealed, and the Fifth Circuit Court of Appeals affirmed in a January 14, 1981 opinion.

Respondents, Mr. and Mrs. Fitzgerald, are long-time personal enemies of former DeKalb County Superior Court Judge E. T. Hendon, Superior Court Judge Clyde Henley, who was Judge Hendon's law partner, and former DeKalb County Sheriff Ray Bonner. Respondents campaigned actively against all three men during the 1976 election in DeKalb County, distributing thousands of leaflets and flyers accusing them of illegal and immoral

acts. Sheriff Bonner blamed his defeat in the 1976 Republican primary on the plaintiffs. (R. 135-42; 237-39; 243) Judge Hendon called Mr. Fitzgerald a "moral degenerate" and a "congenital liar." (R. 138-39) Judge Henley testified that he was "provoked" and had considered suing Mr. Fitzgerald. (R. 297-98)

On September 1, 1976, someone claiming to be Mr. Fitzgerald called the DeKalb County Police Department and made some statements about Sheriff Bonner. A tape of this conversation was played for Mr. Bonner, on the basis of which he signed a warrant on September 2, 1976 charging Mr. Fitzgerald with making a terroristic threat against him (Ga. Code §26-1307) and with criminal libel (Ga. Code §26-2804). Mr. Fitzgerald was in police custody from September 1 until 2:00 p.m. September 2, 1976, on a charge of driving under the influence of alcohol. On September 3, 1976, Sheriff Bonner signed and caused to be substituted a new set of warrants on the criminal libel and terroristic threats charges. Mr. Fitzgerald was not arrested by Mr. Bonner's deputies until 2:00 a.m. Saturday, September 4. The delay in the arrest prevented him from making his bond until September 7, 1976, after the long Labor Day weekend. (R. 354-56) After discovering the second set of warrants Mr. Fitzgerald filed charges against Sheriff Bonner for false swearing and tampering with the evidence. But, because of a request by Judge Henley, Mr. Bonner was not arrested. (R. 306)

While the charges against Mr. Fitzgerald and the counter-charges against Sheriff Bonner were pending, Sheriff Bonner was indicted on a charge of murdering one Timothy Nix. The Fitzgeralds and their daughter testified that the defendant told them the charges against Mr. Fitzgerald would be dropped as soon as Bonner's

murder trial was over. (R. 359) Petitioner said that he only promised to drop the charges if the Bonner murder trial resulted in a conviction. (R. 254) Mr. Bonner was ultimately acquitted by a jury on the murder charge.

During the summer of 1977 Mr. and Mrs. Fitzgerald were highly critical of Judge Henley, Judge Hendon, the petitioner, Judge Robert Broome of DeKalb Superior Court, and of the Superior Court Judge who had been brought in from an adjacent circuit to handle the Bonner murder trial. In particular, they questioned all aspects of the murder trial, the disposition of a murder charge against Judge Henley's former son-in-law which had been reduced to involuntary manslaughter by Judge Broome, and the resolution of a number of criminal cases handled by Judge Hendon, when he was in private practice, before Judge Henley. (R. 344, 369-74) Mrs. Fitzgerald sent a letter to the July-August DeKalb County Grand Jury calling for an investigation of some of these matters. The Grand Jury sent two representatives to see the Fitzgeralds in August to discuss the charges. They determined that at least some of the allegations had possible merit and should be investigated further. Some of the members of the July-August Grand Jury wanted to call for a special grand jury to investigate the allegations of official wrongdoing but changed their minds when it was discovered that a majority of the Superior Court Judges would have to concur in such a proposal. (R. 423-29)

On August 24, 1977, a preliminary hearing on the charges by Mr. Bonner against Mr. Fitzgerald and by Mr. Fitzgerald against Mr. Bonner was held before Judge Tom Moran in the Magistrate's Court of DeKalb County. A transcript of this hearing was made because Mr. Fitzgerald arranged for a court reporter to be present. (R. 254)

At this hearing, after a conference participated in by Mr. Fitzgerald's lawyer, by Mr. Bonner's lawyer, and in part by Assistant District Attorney Mike Sheffield, all charges against both parties were dismissed. Mr. Sheffield not only concurred in the dismissal but stated that he was doing so because what Mr. Fitzgerald was charged with having done was not a crime. (R. 17)

Shortly after the preliminary hearing Judge Henley and Judge Hendon made inquiries in order to ascertain why the charges had been dropped against Mr. Fitzgerald. (R. 156-58; 294) Judge Hendon discussed the matter with the petitioner and told him that the case should be taken to the grand jury despite the result at the preliminary hearing. (R. 156-57; 214-15) Judge Henley joined in part of the discussion and concurred in Judge Hendon's suggestion that the matter should be referred to the grand jury. (R. 217, 218) Though the defendant decided to follow this advice, he did not refer Mr. Fitzgerald's charges against Mr. Bonner to the grand jury. At the hearing in the instant case, the defendant suggested three possible reasons for his decision: (1) that Judges Hendon and Henley had asked him to take the case to the grand jury; (2) that he thought Mr. Bonner's lawyer was unhappy with the result at the preliminary hearing; and (3) that Mr. Fitzgerald had, after the August 24, 1977, hearing, issued more leaflets that were critical of Bonner and Judges Henley and Hendon. (R. 221, 228, 262-63) Mr. and Mrs. Fitzgerald immediately filed a lawsuit against Judge Henley charging him with exercising improper influence over the defendant in deciding to prosecute Mr. Fitzgerald. (R. 363)

On August 8, 1977, Dawn Moore, the plaintiff's daughter, had a conversation with Robert Wilson, the Assistant

District Attorney charged with presenting her father's case to the grand jury. Her understanding of that conversation was that he had authorized her mother to send a letter to the grand jury. His recollection was that he had not so authorized her. (R. 281-82, 455) Judge O'Kelley found that these different versions of what occurred resulted from a genuine misunderstanding. (R. 81) In any event, Dawn Moore told her mother that someone in the District Attorney's office had said it would not hurt if she sent such a letter. The next day Dawn Moore helped her mother draft a letter to the grand jury which was accompanied by a copy of the transcript of the preliminary hearing, a copy of the complaint in the civil lawsuit filed against Judge Henley by the Fitzgeralds, and several newspaper clippings. The letters with enclosures were mailed to at least twenty members of the September-October Grand Jury on September 9 and 10, 1977. (R. 491-92) Before mailing the letters Mrs. Fitzgerald had asked one of the investigating members of the July-August Grand Jury whether it would be all right to do so. She was told that, since the District Attorney's office expressed its views on proposed indictments, there was no reason why she could not do the same. (R. 432-33)

The September-October Grand Jury heard the proposed indictment against Mr. Fitzgerald and returned a "no-bill". At that point a decision was made to try to indict both of the Fitzgeralds on the charge of embracery. It is not totally clear how this decision was reached. Robert Wilson, the Assistant District Attorney, testified that Judges Henley and Hendon first suggested to him that he consider possible embracery charges against the Fitzgeralds and spoke to him at least one other time regarding his reaction to their suggestion. (R. 545-49) The final decision to seek indictments for embracery against

both Fitzgeralds and against Mr. Fitzgerald for terroristic threats was made by the petitioner. (R. 227)

In September 1977, prior to the time that the charges against the Fitzgeralds were taken back to the grand jury, their civil case against Judge Henley came up on the motion calendar before Judge Hendon. At issue was a motion to impose sanctions on the Fitzgeralds, who were proceeding *pro se*, for having failed to appear for depositions. Mr. and Mrs. Fitzgerald argued that a protective order which they had received from Superior Court Judge Dean should be interpreted as protecting them from having to give the depositions. Mr. Fitzgerald made a motion to disqualify all judges in DeKalb County from sitting on the case, which motion was denied by Judge Hendon. Judge Hendon did not disqualify himself from hearing the case despite his admitted hatred for Mr. Fitzgerald, his admitted close friendship with Clyde Henley, and the fact that he had been named in the complaint as having participated in the alleged unlawful influencing of the District Attorney's office with respect to the disposition of the charges against Mr. Fitzgerald. (R. 143-45) At this point, Mr. Fitzgerald asked that he be allowed to withdraw the complaint without prejudice. When some discussion ensued about this motion, he moved to withdraw the complaint with prejudice. Judge Hendon granted the latter motion. (R. Pl's Exhibit #1)

Early in its term the November-December Grand Jury indicted Mr. and Mrs. Fitzgerald on twenty counts each of embracery based on the letters which Mrs. Fitzgerald sent. Prior to arraignment, Judge Hendon contacted the Dean of Emory University Law School concerning the propriety of an Emory professor representing the Fitzgeralds. (R. 148-49) They were arraigned on December

8, 1977, and scheduled to be tried, first on the calendar, before Judge Broome January 3, 1978. This is much earlier than a non-jail case would ordinarily be heard. (R. 538) Judge Broome informally agreed to disqualify himself from hearing the case because of Mr. Fitzgerald's criticism of him and arranged to bring in the same judge who had presided at the Bonner murder trial. When told that Mr. Fitzgerald would ask this judge to disqualify himself as well, Judge Broome replied that, if so, he, Judge Broome, would try the case. (R. 267-69) Shortly before his arraignment on embracery, Mr. Fitzgerald was indicted on the terroristic threats charge. He has not been arrested or arraigned on this charge, and no trial date has been set. Assistant District Attorney Wilson, who was handling the cases against plaintiffs, would have ordinarily decided whether to prosecute or *nolle prosequi* these kinds of cases without consulting with the petitioner, but in the cases pending against the Fitzgeralds he did not have this authority. (R. 272-74)

At the conclusion of a two-day hearing on respondents' motion for an injunction, Judge O'Kelley granted the requested relief. He found that the "prosecution of the Fitzgeralds has been in bad faith and for purposes of harassment with the intention of chilling their First Amendment rights." (R. 86) In reaching this ultimate conclusion he relied on at least four indicators of bad faith: (1) the interference by Judges Henley and Hendon in the petitioner's decision of whether or not to prosecute the Fitzgeralds; (2) the call by Judge Hendon to the Dean of Emory Law School concerning the representation of respondents by an Emory professor; (3) Judge Hendon's failure to recuse himself from hearing a motion in the Fitzgerald's civil case against Judge Henley; and (4) the

irregular scheduling of the Fitzgerald's criminal trial. (R. 86) The court did not find it necessary to resolve the question of whether or not any of the things that plaintiffs were charged with doing could have formed the basis of a valid criminal conviction but did indicate doubt that they could be convicted as charged. (R. 86-87) On appeal, the Fifth Circuit affirmed the district court on the ground that the "prosecution was brought for purposes of harassment and retaliation and would not have been brought but for the improper influence exerted on the prosecution by certain DeKalb judges to seek the indictments." Appendix at 25.

SUMMARY OF ARGUMENT

There is no jurisdictional problem in the instant case at all since this Court has specifically held that 42 U.S.C. §1983 is an exception to the anti-injunction statute. There is no conflict between the decision in this case and this Court's decisions in *Younger v. Harris*, 401 U.S. 37 (1971) and its progeny. Both the district court and the Fifth Circuit specifically applied *Younger* standards to the facts of the case. Thus, no purpose would be served by granting the petition for certiorari.

ARGUMENT

Petitioner presents three arguments as justifying his petition for certiorari. The latter—that the district court never had jurisdiction because of the anti-injunction statute (28 U.S.C. §2283)—is difficult to fathom. As petitioner concedes at page 15 of his brief, *Mitchum v. Foster*, 407 U.S. 225 (1972) established that 42 U.S.C. §1983 is an exception to the anti-injunction statute. Petitioner attempts to argue that in order to come within this exception respondents must show a violation of their First

Amendment rights. This, of course, is precisely what the district judge found. See Appendix at 33. But even if he had not, §1983 is not limited to violations of the First Amendment. If respondents were prosecuted in bad faith, their Fourteenth Amendment rights were violated. Petitioner's first and second arguments appear to be virtually identical. He asserts that the decision in the instant case is inconsistent with *Younger v. Harris*, 401 U.S. 57 (1971) and its progeny. Respondents emphatically disagree and urge this Court to deny review.

The district court found the prosecution of the respondents to be "in bad faith and for purposes of harassment with the intention of chilling their First Amendment rights." (R. 86) There was abundant evidence to support this conclusion, and the Fifth Circuit affirmed in a relatively short opinion. Appendix at 23. The district court did not find it necessary to resolve the question of whether respondents could have been convicted of anything. This ruling is the key to petitioner's argument. He asserts at page 12 of his brief that unless "the State has brought the prosecution . . . without hope of obtaining a valid conviction" a federal court cannot issue an injunction against prosecution. He refers to language in *Cameron v. Johnson*, 390 U.S. 611 (1968), *Younger v. Harris*, 401 U.S. 37 (1971), *Perez v. Ledesma*, 401 U.S. 81 (1971), and *Kugler v. Helfant*, 421 U.S. 117 (1975) in support of his position. These cases will be discussed in turn.

In *Cameron* this Court considered and rejected on the merits a constitutional challenge to the picketing statute being utilized to prosecute the plaintiffs. Plaintiffs then argued that "special circumstances" nevertheless justified injunctive relief. The three judge district court expressly found "that there was no harassment, intimida-

tion or oppression" and that they were "being prosecuted in good faith." *Cameron v. Johnson*, 262 F. Supp. 873, 876 (S.D. Miss. 1966). In attempting to overturn this decision plaintiffs made several arguments: (1) that the statute was selectively enforced; (2) that plaintiffs had been entrapped; (3) that the only purpose of the statute was to stop plaintiffs' activities; and (4) that there was insufficient evidence to convict the plaintiffs as charged. It was in answer to the fourth argument that the Court in *Cameron* discussed the likelihood of securing valid convictions. 390 U.S. at 619, 621. Obviously, bringing a case that cannot succeed is a strong indicator of bad faith. But there is no suggestion in *Cameron* that such a finding is always necessary to prove the existence of bad faith. Instead, the general language talks about "special circumstances" necessary to justify injunctive relief without attempting to define what those might be. 390 U.S. at 618.

Younger v. Harris, supra, is the landmark case dealing with the circumstances in which a federal court can enjoin a pending state criminal prosecution. It established the proposition that federal courts should not ordinarily intervene in such matters, even if the statute being utilized is unconstitutional on its face. The Court made clear that the exceptions were to be limited to situations in which irreparable injury would occur and that ordinarily "bad faith and harassment" would be required. 401 U.S. at 53. No real attempt is made to define these terms, and in the very next paragraph they are referred to in the disjunctive indicating that either bad faith or harassment will suffice. 401 U.S. at 54. The Court does talk about inability to obtain a valid conviction, such as was alleged in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), as being an example of bad faith. 401 U.S. at 48. How-

ever, there is no suggestion that such is a prerequisite to a finding of bad faith.

In *Perez v. Ledesma, supra,* the Court makes the following statement:

> Only in cases of proven harassment or prosecution undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstance where irreparable injury can be shown is injunctive relief against pending state prosecution appropriate. 401 U.S. at 85.

Petitioner relies on this language for the proposition that inability to obtain a valid conviction is a necessary element of "bad faith." But the sentence is written in the disjunctive; either "bad faith" or "harassment" will suffice. In the instant case the district judge specifically found both "bad faith" and "harassment." Consequently, even if his bad faith finding was at odds with the language in *Perez,* the harassment finding would still support injunctive relief.

In *Kugler v. Helfant, supra,* the Court stated that "bad faith" "generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction." 421 U.S. at 124 n.6. This definition modifies the one given in *Perez,* in that "reasonable expectation" has replaced "without hope" and "generally" has been added as a qualification. The implication is that, while usually bad faith will involve a small likelihood of success, such will not always be the case. This reading is in line with the common sense meaning of the term, since one could well imagine that a vindictive prosecutor could use an extremely technical violation of a criminal law or a criminal statute that is almost never enforced in order to persecute rather than prosecute someone. *See, e.g.,*

Duncan v. Perez, 445 F2d 557 (5th Cir. 1971), *cert. denied*, 404 U.S. 940 (1971).

In the instant case the district judge had abundant evidence from which to find "bad faith" and "harassment," and the Fifth Circuit affirmed on appeal. Those factual findings are not challenged. The trial judge also indicated substantial doubts about the possibility of a conviction of the respondents on either of the charges. Petitioner's argument is that there must be no possibility of a conviction before injunctive relief can be granted. This Court has never said any such thing and in its latest word on the subject in *Kugler* indicated that such a finding is not even necessary to a finding of bad faith. In the instant case, the trial court and the Fifth Circuit made clear that the facts in this instance were exceptional. Far from being inconsistent with the *Younger* line of cases, the courts applied *Younger* standards to the facts that were adduced at trial. No purpose would be served by reviewing this case on certiorari.

Finally, this case is not appropriate for review because of the circumstances surrounding the petition for certiorari. Petitioner was sued individually and in his official capacity. He was defeated for reelection and left office on December 31, 1980. The attorney representing him on this petition is no longer an employee of the District Attorney of the Stone Mountain Judicial Circuit, and the new District Attorney has not joined in filing this petition. Mr. Peek has filed this petition in his individual rather than in his official capacity. There has been no indication that the new District Attorney has any interest in prosecuting the respondents. Thus, whether the case is technically moot or not, there is a strong likelihood that respondents would not be prosecuted even if petitioner's replacement were given the opportunity to do so.

CONCLUSION

For the foregoing reasons the Court should deny the petition for certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with three copies of this pleading by depositing in the United States Mail three copies in a properly addressed envelope with adequate postage thereon.

This ____ day of May, 1981.

FRANK P. SAMFORD, III
Attorney for Respondents